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Case No. 03-931

IN THE SUPREME COURT OF THE UNITED STATES

State of Florida,

Petitioner,

v.

Joe Elton Nixon,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JOINT APPENDIX
VOLUME II

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Counsel for Petitioner

Certiorari filed December 22, 2003
Certiorari granted March 1, 2004

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[8] IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

CASE NO. 84-2324

STATE OF FLORIDA,

vs.

JOE ELTON NIXON,

Defendant.

PROCEEDINGS: Hearing

HELD BEFORE: Honorable J. LEWIS HALL

DATE: Wednesday, August 30, 1989

TIME: 9:00 A.M.

LOCATION: Courtroom 3C
Leon County Courthouse
Tallahassee, Florida

REPORTED BY: Eugenia B. Lawrence
Official Court Reporter

Eugenia B. Lawrence
Official Court Reporter
Leon County Courthouse, Room 404
Tallahassee, Florida 32301

[9] APPEARANCES

REPRESENTING THE STATE OF FLORIDA:

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[10] PROCEEDINGS

THE COURT: Let the record reflect we are back under a relinquishment of jurisdiction pursuant to order of the Supreme Court of Florida in the case of State of Florida vs. Joe Elton Nixon that was identified in the Circuit Court of Leon County as Case No. 84-2324 and captioned in the Florida Supreme Court as Joe Elton Nixon vs. the State of Florida.

Now, a brief review of progress of the matter to get to this point. There was raised during the course of the Florida Supreme Court review the issue of ineffective assistance of counsel that arose primarily in general terms as a result of trial tactic and strategy employed by Mr. Corin at the time of trial, in which essentially upon the outset Mr. Corin conceded that Mr. Nixon had committed the homicidal act itself. It was raised post issue at the Supreme Court level under the format of ineffective assistance of counsel. In that regard, an order of October 20, 1987, the Florida Supreme Court relinquished jurisdiction back to the Circuit Court of the Second Judicial Circuit and in its order of remand sent it back for evidentiary hearing. The provisions of it essentially were that the trial court would inquire of Mr. Corin and Mr. Nixon as to whether Mr. Nixon was informed of and knowledgeably and voluntarily consented to [11] that strategy.

The provisions of that order caused some discomfort to all the components. Accordingly, clarification was requested of the Florida Supreme Court in that regard.

By order dated October 4, 1988, the Supreme Court relinquished jurisdiction back to the Second Circuit and noted therein that the Appellant, who raised the issue at the Supreme Court level, would have the burden of establishing the claim of ineffective assistance of counsel and it would be the Appellant who would be the proponent of witnesses, with the State having the right to cross-examine the witnesses.

That hearing was conducted. The Appellant presented Mr. Corin I think only as a witness. Is that not correct, Mr. Strickland? I don't think there were any witnesses other than Mr. Corin.

MR. STRICKLAND: Mr. Corin only, Your Honor.

THE COURT: Upon conclusion of the presentation of that witness, the Appellant announced that it had no further witnesses to call.

The State desired at that point to present witnesses and to present evidence. The Court ruled at that time that the matter had been resubmitted to the Florida Supreme Court and a request for clarification. I concluded from the order by which it returned here that those [12] terms and provisions were specific in their application and, therefore, denied the State the right to present witnesses because the terms of the order provided that only the Appellant would be the proponent of witnesses and the State's participation would be limited to cross-examination. I, therefore, denied the State's right to present evidence.

The matter then went back to the Supreme Court and has again been relinquished in jurisdiction back to this court. The order now – and to digress for moment, revert back – and I was questioned by counsel, appropriately, at the close of the former hearing with regard to findings of fact. I noted on the record at that time that I was not inclined to enter any findings of fact because, under the terms of the order, and in view of the State's desire to present evidence, the Court had not conducted what the Court would consider to be a complete evidentiary hearing, and, therefore, it would not be appropriate to make findings of fact based on incomplete evidence.

In retrospect, in view of the most recent order, I am grateful I did not make findings of fact because it would put this

court in the position of having made findings of fact previously, before exhaustion of the hearing.

It now is back for pretty standard evidentiary format, and that is the Appellant still has the burden of [13] proof and may with the presentation of any evidence that it might see fit to or to stand on the evidence previously presented and so note for the record. The State, under the most recent order, has the right to present evidence, witnesses, and upon conclusion of the presentation and probably with a reserved time by the Court to review the evidence status of the case, make findings of fact in its order and the matter then go back to the Florida Supreme Court.

It's my view, reading the orders that are now collectively before the court, that the Appellant has raised the issue of ineffective assistance of counsel to the Florida Supreme Court, the order of relinquishment of jurisdiction for this court notes that, as it is the Appellant who raised the issue, it is the Appellant's burden to establish either that Mr. Nixon – well, to re-gear it – the issues posed by the Supreme Court in its order is whether, one, Mr. Nixon was informed of the trial tactic to concede commission of the act or, two, knowing it, consented to it, or, three, was aware of the tactic and acquiesced in it.

However, with the Appellant bearing the burden of proof, perhaps better stated, it's the Appellant who has the burden of proving, in support of its contention of ineffective assistance of counsel, that Mr. Nixon was [14] neither told, nor consented, nor was aware and acquiesced in it.

To any extent that the protraction of these proceedings might cause other inconvenience, discomfort, or whatnot at the Florida Supreme Court level or any level that might thereafter be invoked, my apologies to my colleagues above. And I wish to make sure they understand the caution with which these proceedings have progressed has not been motivated by any

obstreperousness or reluctance to adhere to your order, but simply out of an abundance of caution to make sure in any case, especially in a capital case, that all safeguards are observed and that the requirements of the appellate court are meticulously observed, followed , and that what flows from this Court will be in keeping with their desires. If there has been any misunderstanding in that regard, then with respectful deference to my colleagues, I apologize.

All right. Against that backdrop, Mr. Strickland, on behalf of the Appellant Mr. Nixon, do you have any opening comments that you might wish to make?

MR. STRICKLAND: Yes, Your Honor. I want to interpose an objection, just as I did the last time we were here. The Appellant once again objects on the basis that the issue raised on appeal was a limited issue, not an expanded issue as the Supreme Court has now presented it [15] and remanded it to this Court.

The issue on appeal concerns the issue of written consent pursuant to U.S. vs. Cronic. It is not an ineffective assistance of counsel brought pursuant to Rule 3.850. If it were in the posture, it would be appropriate for Capital Collateral League to be in these proceedings which they, of course, are not. And the issue is limited by the framework which the Appellant, through his attorney, posited it to the Supreme Court.

Accordingly, having so objected, also on the basis – as previously on the basis of attorney-client privilege, Your Honor, I note for the record that we are here now on the basis of three orders. I believe they are dated October 20th, 1987, October 4, 1988, and then the last order from a February 1st, 1989. And we are here pursuant only because of the framework issued by the appellate court, Your Honor.

Thank you.

THE COURT: Ruling on your motion, the objection is overruled.

Any preliminary comments from the State?

MR. MARKY: I just want it on the record for further review this objection that has been posed, that he didn't raise it, it's limited – it's been presented to the Supreme Court now three times and they have obviously [16] disagreed with him. And, therefore, we think – that is our position, that we think the Court's announced ruling is correct. But, I wanted that so that the Supreme Court understands it.

THE COURT: I was about to inquire did you wish me to revisit the ruling.

MR. MARKY: No, Your Honor. I just want the Supreme Court to be aware how we read their decision.

THE COURT: I have every confidence that you probably will have the opportunity to tell them personally.

Okay. Mr. Strickland, having the burden, do you wish to present any further evidence with regard to the issues on remand.

MR. STRICKLAND: No, Your Honor. My understanding of the proceedings is that we are going to republish or have the Court take note of the immediate previous hearing, which was December 19, 1988. I believe the Court has now been provided with a copy of that transcript. That is our presentation.

However, Your Honor, as I presented to the State and also to the Court yesterday a request that the Court take judicial notice of the entire transcript and that entire record of the trial court and I had noted for the Court's convenience some

particular aspects of that record. And I believe I have spoken to the State about that.

[17] MR. HANKINSON: We have no objection to that, Your Honor. I believe it is a part of the record, as a matter of fact.

THE COURT: They have been delivered to the Court. I will now place it in the court files.

I would concur with Mr. Hankinson's observation. They are a part of the court file. But, less [sic] there be no misunderstanding, for the purpose of this hearing, they will be entertained by the Court as an exhibit for this hearing and in conjunction – not in conjunction, but with the same point in mind, you now tender the transcript of the proceedings conducted on December 19, 1988, complete with Mr. Corin's testimony also for the purpose of this hearing?

MR. STRICKLAND: That is correct, Your Honor.

THE COURT: In other words, it is part of the record, it's part of the record on December 19th, but in an abundance of caution you also want to make sure it's part of the hearing held today, August 30, 1989.

MR. STRICKLAND: All right. As well as the entire record that the Court heard back in I believe 1985, the record of the trial.

THE COURT: The trial transcript would be entertained as part of the record for this proceeding.

MR. STRICKLAND: Thank you, Your Honor.

[18] THE COURT: You apparently then rest with respect to presentation?

MR. STRICKLAND: Yes, Your Honor. Thank you.

THE COURT: All right.

MR. HANKINSON: We will call Mike Corin.

THE COURT: The most recent order gives the State leave to present evidence. Do you wish to call Mr. Corin?

MR. HANKINSON: Yes, sir, Your Honor. And I would also ask that the record reflect that from a quick perusal of the December 19th transcript, I don't see that it reflects that the Defendant was present on that date and that he is present here in the courtroom today. I would like the record to reflect that.

THE COURT: Mr. Nixon has been present at all hearings conducted.

MR. HANKINSON: Thank you.

THE COURT: And is present today.

All right. Mr. Corin, would you please approach? Mr. Clerk, would you swear the witness?

(WHEREUPON, THE WITNESS WAS SWORN BY THE COURT CLERK)

MR. STRICKLAND: If I may interpose an objection as to any testimony given by Mr. Corin. It's protected by the attorney-client privilege, Your Honor. And Mr. Corin has already testified in these proceedings in court and the State had a full and ample opportunity to cross-examine [19] Mr. Corin, which it availed itself of. And, for that reason, Your Honor, we object.

We do not waive Mr. Nixon's privilege with Mr. Corin. Thank you.

MR. HANKINSON: We wouldn't have any problem with that being a continuing objection so we wouldn't have to keep interrupting the flow of Mr. Corin's testimony. But, I think –

THE COURT: The ruling of the Court in that regard is that the order of October 20, 1987, entered by the Florida Supreme Court specifically cites the case of Turner vs. State. Their cite on it was 12 Florida Law Weekly, 238. I'm sure by now it's been incorporated into the official Southern Reporter.

MR. MARKY: I think you had a copy of that case earlier, and handed it to Mr. Strickland.

What is the Southern Reporter cite?

MR. MARKY: 530 So.2d beginning at Page 45. And the language, Your Honor, is at Page 46, "Under the evidence code, the privilege does not exist in these circumstances."

MR. STRICKLAND: Your Honor, if I may speak to that particular issue?

THE COURT: Yes, sir.

MR. STRICKLAND: The issue was actually resolved on Page 47 when it – and it's at, I believe, the first [20] paragraph. It says, "Specifically, he claims – " and this has to do with the claim – "counsel failed to advise him of his right to voir dire and charge conference participation. In addition, he denies authorizing counsel to waive his presence, thereby implying that counsel did in fact waive his presence without his consent."

And the Court, in its ruling on that particular point says, "Accordingly, we find that Turner no longer has any attorney-client privilege as to communications – " and then comes the key working – "concerning his crucial stage presence or waiver thereof."

In other words, it's limited. And that is exactly what we have here.

THE COURT: All right. The ruling of the Court is that the issue before the Florida Supreme Court and, therefore, the issue before this court raised and framed by the Supreme Court deals with the issue of ineffective assistance of counsel in three specific areas. The Appellant is the one who raised that issue and, therefore, the Supreme Court has seen fit to rely, and I think appropriately so, on the Turner case. And that is, under these circumstances, the attorney-client privilege is not available to be invoked unless there is an abandonment of the claim for relief.

In other words, you can't – I don't see that you can [21] say we are going to contend that counsel was ineffective in assistance, and then claim the confidential communication privilege and continue to maintain the position.

MR. STRICKLAND: Your Honor –

THE COURT: I don't expect counsel to really argue that point in this situation. But, that is the basis of the ruling of the Court. I'm going to overrule your objection.

Mr. Corin, in a sense in defense of his representation of Mr. Nixon, may testify with regard to communications between him and Mr. Nixon within the scope of the claim made by the Appellant as it applies to Mr. Corin. I will overrule the objection.

MR. STRICKLAND: Thank you, Your Honor.

MR. CORIN: Your Honor, before we start, at the last hearing I was examined by both Mr. Strickland and the State and I don't know that any of my answers would change from that date to this date. I am sure they would not. And I feel very uncomfortable with the fact that Mr. Nixon is not releasing me from the privilege and I don't intend really to testify as to matters that were not raised at the prior hearing. And I recall the Court advising the State, upon objection about the limited nature of the privilege, that he would not direct me to answer any questions posed by the State if I objected [22] based on the privilege. So, having received no new allegations since the last hearing concerning my relationship with Mr. Nixon and how that might have been effective or ineffective, I don't feel free to respond to any inquiry, but would reaffirm my prior testimony at the December 19th hearing.

THE COURT: For what purpose does Mr. Marky rise?

MR. MARKY: I just wanted to make a response with respect to Mr. Corin's statement.

THE COURT: Yes, sir.

MR. MARKY: And that is that the Canons of Professional Ethics and the Supreme Court in the Turner case goes on to say that the Court may direct the witness to answer the questions where the circumstances are such that the attorney-client privilege no longer exists.

While I understand his discomfort, Your Honor has the authority under the code to direct him to answer. It specifically says so, and the witness must answer the questions.

MR. CORIN: Your Honor, I would also – I mean, I am the one who seems to be under the gun here. And I would point out that the code says "when required by a tribunal to reveal such

information, the lawyer may first exhaust all appellate remedies."

I have not yet –

[23] THE COURT: I'm sorry. I did not understand –

MR. CORIN: If you require me to reveal information that I think is in violation of the privilege, prior to that I must first exhaust all appellate remedies. I says that I may, not Mr. Nixon. But, as an attorney, I may.

But, I cannot exhaust appellate remedies until I know what it is I would be objecting to if they asked me a certain question, I guess. I guess we could proceed by a proffer of questions and then if I object, then I guess we could seek appellate ruling.

THE COURT: Well, it shouldn't be too difficult because there is already a vehicle in place.

MR. HANKINSON: The last time I checked, the Florida Supreme Court was our appellate court of last remedy. I think they have pretty well addressed this issue based on Mr. Strickland's objection last time.

THE COURT: All right, sir. I am going to direct the witness to respond – as a general directive, to respond to questions posed by the State with leave to request guidance or instruction when you see that or perceive that perhaps a question is beyond the issue as you understand it, where it's a little far afield from these specific issues in this case.

All right, Mr. Hankinson.

WHEREUPON,

[24] MICHAEL MAYNE CORIN

was called as a witness, having first been duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HANKINSON:

Q State your name, please.

A Michael Mayne Corin.

Q I believe back at the December hearing you indicated you were employed with the Public Defender's office. Are you still so employed?

A Yes, sir.

Q At the previous hearing you indicated that you had started representing the Defendant Mr. Nixon in the fall of 1983, is that correct, on other charges than the murder case?

MR. STRICKLAND: Your Honor, if I may. That goes beyond the issues raised by the Supreme Court, not raised by the Appellant. That is, the question, as the Court has in its opening – or in the Court's opening statement or summary, whether he was informed of the strategy to concede guilt and seek leniency, whether he knowingly and voluntarily consented to the strategy, and whether he affirmatively consented.

It has nothing to do –

THE COURT: Well, that is not quite accurate. The [25] third prong is whether if he did not affirmatively consent, acquiesced to its use. That third prong is, in my perception, an

extremely broad standard because of the use of the word "acquiesced." And in order for that to proceed – and the reason I would overrule the objection is, how is someone supposed to perceive that someone else has acquiesced brings into play as relevant proof or disproof of the fact of consequence to Appellant at any proceedings, of their ability to perceive and judge whether that person did or did not acquiesce. Therefore, historical background information, acquaintanceship, knowledge of, the ability to observe communications, verbal or nonverbal, is brought into relevancy.

So, did you start representing Mr. Nixon back in 1983 I think is relevant to did you know Mr. Nixon, did you know Mr. Nixon well enough to understand what Mr. Nixon was saying, did you know him well enough to understand what nonverbal communications might have been communicated by Mr. Nixon even if he didn't say anything.

MR. STRICKLAND: Well, Your Honor, it goes – my objection is it goes beyond the scope.

Thank you, Your Honor.

THE COURT: Overruled.

BY MR. HANKINSON:

Q And if you were looking for that reference, it's on [26] page 55.

A 55.

Q Let me restate the question.

In the previous hearing you indicated you had started representing Mr. Nixon in the fall of 1983; is that correct?

A To the best of my knowledge.

Q And what was the first charge that you were appointed to represent him on?

A I don't specifically recall. It would be a matter of record.

Q In the fall of 1983, how many charges were you appointed to represent him on?

A Again, I don't specifically recall.

Q You don't recall what charges you represented him no?

A Well, I represented him on several different –

Q Well, tell us what charges you recall representing him on.

A I think I represented him on an attempted burglary and a robbery, and maybe battery on a law enforcement or corrections official at some point.

Q Okay. Three additional cases to the murder case; is that correct?

A To the best of my recollection.

Q Robbery, burglary, and battery on a law enforcement officer?

[27]A To the best of my recollection.

Q Now, do you recall were the robbery and burglary charges being prosecuted at the same time? Were those overlapping pending matters?

A Again, to the best of my recollection.

You have got to understand I have represented hundreds of clients over the years on numerous cases. As to exact points in time – I mean, it's a matter of, I assume, public court record to pull out Mr. Nixon's files and give me the exact dates and I can verify them.

Q During the course of representing Mr. Nixon on the robbery charge, do you recall how that case was resolved?

A Yes.

Q How was that resolved?

A To the best of my recollection, during jury selection the alleged victim saw me sitting with Mr. Nixon in the courtroom, signaled me. I had talked with her numerous times prior to the trial. She said, "That is not the man who robbed me."

I said, "Yes, I didn't think it was." I had I think subpoenaed his younger brother, I think it's Joseph, to come to the courthouse. I think he was in the training school at Marianna at the time. We were informed of the witness' statement to me. I think we took the witness back into the holding cell, at which time she identified his younger brother as the [28] assailant.

I think she had misidentified Mr. Nixon because law enforcement officers had shown her a picture of Mr. Nixon when he was about the age that his younger brother was as opposed to a picture of him at the time of the offense.

But, essentially, based on that information, the State dropped the case.

Q So, you had gotten right up to trial, in fact, had started the trial, correct?

A Yes.

Q Had you discussed with Mr. Nixon the strategy that you were going to employ during the trial?

THE WITNESS: Your Honor, I would decline to answer that question.

MR. HANKINSON: The question calls for a yes or a no, doesn't require the disclosure of confidential communications even aside from any other objections. I would ask the Court to direct the witness to answer the question.

MR. STRICKLAND: Your Honor, it clearly calls for privileged information, has no bearing on this. What he discussed with this client at some previous time has no bearing on this at all.

THE COURT: Direct the witness to respond to the question.

[29] THE WITNESS: Your Honor, I'm very, very uncomfortable responding to matters that I think are subject to the privilege, when the Canons clearly permit me to exhaust appellate remedies.

I would ask –

THE COURT: At this point, the basis of the Court's ruling, in light of the issue posed by the Supreme Court, one of the issues at least tangentially is do you discuss strategy with

your clients. I do not see that as an intrusion on confidential relationship. It is not so much whether he discussed strategy with you as much as it is did you discuss your trial strategy with him.

THE WITNESS: Well, Judge, I think that reveals information that occurred during the representation of a client and I respectfully at this point would decline to answer that and would ask permission to have a break to speak with some other lawyers in my office as to how to proceed at this point.

THE COURT: Okay. I will grant your request, certainly.

MR. HANKINSON: Maybe some direction to Mr. Corin would be helpful so that we can proceed without having to take a break every time. If the Court would like me to do that, I don't have any problem telling him basically where I am going, although it's basically what the Court [30] has said, if the Court wishes me to do so.

THE COURT: I have no problem with you informing Mr. Corin as to the general thrust of where you intend to go in your questions so that when he meets with his colleagues, they will have a more extensive basis for discussion.

MR. HANKINSON: It's basically as the Court has set out. I intend to develop Mr. Corin's prior dealings with his client, to show the communication and some rapport developed so they were able to communicate, and Mr. Nixon's understanding of the processes and strategies employed. I mean, there is nothing really secret about where I'm going. That is where I intend to try to elaborate on.

I think that would be helpful to the Court's ruling and to the Supreme Court's later review.

THE COURT: Although somewhat unusual, do you have any clarifying questions you wish to put to Mr. Hankinson with respect to that so that you might discuss it?

THE WITNESS: I think the end result of all this is I'm going to decline to answer. My impression or what I feel is I'm going to decline to answer any questions which relate to any discussions that I might have had with Mr. Nixon. I do not decline to answer any matters that are essentially public record. But, as to matters that he and I may have discussed during the period of time [31] that I represented him as a client –

THE COURT: Including this case?

THE WITNESS: Including any matters that were not done at the hearing in December of this year, inasmuch as at that time, Your Honor, the Court ruled that the State would be allowed to cross-examine me as to matters that Mr. Strickland raised after having waived the privilege for Mr. Nixon to the limited extent of his direct and the limited scope of proper cross-examination. And I just don't feel that I can, as a lawyer, in the clear face of Mr. Nixon exercising his privilege today, answer any questions.

I will discuss it again with lawyers in our office. I did discuss it with them yesterday and based upon 4.16, Subsection D, it was our impression at that time that –

THE COURT: Well, you have announced your intention in that regard. You have also announced that, given the Court's direction to respond to the questions – of course, I cannot direct you to respond to questions that have not yet been asked. But, with respect to the question that has been asked, I think it falls within the purview of the directive of the Florida Supreme Court, it falls within the issues as framed by the directive to answer those questions. It would be my view, however, that if it's your desire, appropriately, to have appellate review [32] with regard

to it, that review can be within the ambit of these proceedings because it is on relinquishment from the Florida Supreme Court. The Florida Supreme Court is the highest appellate body in this state, at least to my knowledge.

I would imagine that rather than go through an independent appellate review of the Court's ruling, that issue could be resubmitted and posited right to the Supreme Court in conjunction with these proceedings and a rather rapid determination made.

THE WITNESS: Judge, I would have no –

MR. HANKINSON: We are going to have some response to that, Judge, on what procedure the Court can take. But, I would prefer he be allowed to take the break he has requested, decide for sure what he is going to do, unless he now has decided that and does not want to consult with people.

THE WITNESS: Well, I want to consult with some people. But, what I would like to suggest, Your Honor, is if it is determined that I'm not going to answer certain questions, what my suggestion would be – and heavens knows that has been around a long time, it has been back now since February – I would ask that the questions be posed, I interpose the privilege at the proper time, and then a transcript of that proceeding be certified to the [33] Supreme Court. And if they direct me to answer, then we can have the hearing next week, if so directed, at least this portion of the hearing.

MR. HANKINSON: That is not the procedure that the State suggests, Your Honor.

THE COURT: What is the procedure the State suggests?

MR. HANKINSON: What we are here on, Judge, is a claim that the Defendant has raised.

THE COURT: I understand.

MR. HANKINSON: It is his ability to waive this privilege.

I think if Mr. Corin is going to impose this confidential privilege, I think it is up to the Defendant to either waive the privilege or abandon his claim of ineffective assistance of counsel that he has raised in the Supreme Court. I mean, if he refuses to waive it –

THE COURT: No, that won't fly. The privilege can be invoked by counsel and can be maintained until released. It's not required that the individual client be the one who announce it.

MR. STRICKLAND: Your Honor, if I may –

THE COURT: It is one of the problems inherent in this proceeding. The lawyer is a professional person who says I have not been told that the privilege by which I am bound has been waived. Until I hear that waived or [34] until I am directed – and that doesn't give me heartburn or ego problems, but, in essence, until I am directed by a court higher than a circuit court, I am not going to waive the privilege.

MR. HANKINSON: Well, I'm not asking the court to waive it. I'm asking the Court to make sure on the record it is within the Defendant's power to waive the privilege.

THE COURT: Well, I think that is obvious.

MR. HANKINSON: Okay.

THE COURT: The Defendant can waive the privilege any time the Defendant wants to. Mr. Strickland, on behalf of the Defendant, has said, "We ain't waiving the privilege."

That is pretty clear, too.

MR. HANKINSON: If the record is clear –

THE COURT: Mr. Corin is saying if the Defendant has not waived the privilege, I am not going to breach the privilege.

MR. HANKINSON: Oh, I'm not asking the Court to do that.

THE CLERK [sic]: I'm directing him to answer the question because of the Supreme Court order, the citing of the Turner case, and my perception is that they have sent the case back for testimony by Mr. Corin and Mr. Nixon as to whether that took place.

[35] Now, if they cannot talk about on the record what took place, then the Supreme Court has exercised a rather futile undertaking. I don't believe that the Supreme Court of Florida undertakes futile missions. If they have sent it back here, citing the Turner case, it's obvious that they – to me, at least – that they would propose that testimony be given by either or both Mr. Corin and Mr. Nixon with regard to their communications respecting the trial tactic employed at the trial in the case. And, therefore, I have directed Mr. Corin to respond to the questions in that regard. He has declined to do so. He wants to go hold prayer and communion with his colleagues. If he comes back from that prayer session, then I think it appropriate that we go through whatever litany of questions you wish to ask him and those can be single-shot objected to or declined as the case may be, and then it [sic] be sailed right back to the Supreme Court, as the highest appellate court, to determine whether they will direct Mr. Corin to respond or not respond.

MR. STRICKLAND: Your Honor, if I may be heard on that point.

THE COURT: Yes, sir.

MR. STRICKLAND: Your Honor, I believe the suggestion by Mr. Corin is the appropriate one because of the following.

[36] The privilege and the privileged information at this point is of particular importance to Mr. Nixon. Mr. Nixon may well be back in a trial posture. Certainly at this time we are in a prosecutorial posture; we are not out on direct appeal. So, if the question posed causes a problem in that it would reveal information that is privileged to Mr. Nixon and Mr. Corin, and Mr. Corin has raised that as well, but if it is that, it is better to have it resolved appropriately by the Supreme Court than to have the information out, the harm done to Mr. Nixon, and then for the Supreme Court to come back and say that was error.

THE COURT: I don't think I said anything that does violence to that.

MR. STRICKLAND: No, Your Honor.

MR. HANKINSON: And I don't think the State has asked anything. I think the Court may have been confused by what I was saying, so it obviously wasn't very clear.

I'm not disagreeing with what you just stated. My concern was that the record not be perfectly clear that Mr. Nixon is at this point refusing to waive the privilege –

THE COURT: No. No, that is another little tangential problem in this type of proceeding. Mr. Nixon has neither claimed a privilege nor waived a privilege. Counsel for Mr. Nixon has declined to waive on behalf of [37] his client. And I'm not at liberty to find out as to whether Mr. Nixon has or has not waived the privilege. And I'm not at liberty to ask Mr. Strickland even whether he has asked Mr. Nixon about it.

Another nice little curlicue of this proceeding, because the relationship between Mr. Strickland and his client is confidential and any communications between them is in confidence.

I can only surmise, based on the fact that Mr. Strickland is a respected officer of this court, that he is presenting his client's desires. I don't know that, but I have to assume it.

But, I cannot inquire of him even as to whether he has discussed it with Mr. Nixon.

So, Mr. Nixon has neither claimed nor waived. I take the view that he has, however, through counsel, declined to waive the privilege. Accepting it at face value, I think that is where we are.

MR. HANKINSON: We are going to take a recess?

THE COURT: Uh-huh. Sounds like a good idea to me.

MR. STRICKLAND: Your Honor, may I have a moment to discuss with Mr. Nixon some of the proceedings in the holding cell where we have some privacy?

THE COURT: I am sure, to the extent possible, Lieutenant Peacock will accommodate that request within the parameters of reasonable security.

[38] THE WITNESS: Judge, I will try to be back in 15 minutes.

THE COURT: I don't put any time limit on that.

(COURT IN RECESS)

THE COURT: Where are we then in the proceedings?

MR. CORIN: Your Honor, I consulted with attorneys in my office and I would continue to object based on the attorney-client privilege to matters that were communicated between myself and Mr. Nixon.

THE COURT: All right. I think the Prosecution and the Defense have both made their positions abundantly clear then. I assume that it will now proceed, if you desire, on direct resolution by the Supreme Court as to whether he will be compelled to respond or not. I would suggest that we proceed with specific questions and response by the witness that he declines to answer that question.

MR. MARKY: Your Honor, obviously, when it goes to the Supreme Court, the Attorney General handles it in the Supreme Court, not the State Attorney. So I would like to put on the record, so that that person will understand the authorities, have the authorities in the record. I don't mean to take a great deal of time, Your Honor, and I won't do so. But, I would like to place it in the record so that is known by whoever prosecutes the case.

[39] THE COURT: I understand.

MR. MARKY: Your Honor, the cases cited – one of them is Wilson vs. Wainwright at 248 So.2d, Page 2249. It's a First DCA case.

Other cases where this has been addressed is Taskee vs. United States, 504 Fed.2d, 332, the Eighth Circuit, and United States v. Woodall, 438 Fed.2d, 1317, Fifth Circuit. Those cases collectively hold that by operation of law when a defendant makes a charge against counsel, counsel under both code and his ethical obligation is to reveal the communications between him and his client when it cures all false acts and that it trifles with the truth and it perverts justice to allow the charge of

incompetence to be made and then not to compel the relevant disclosure of that information.

That is the basis of the State's position as to why Mr. Corin has no legal right or entitlement to refuse to answer the questions propounded as the Court has previously ruled.

Thank you, Your Honor.

THE COURT: Primarily the basis for this Court's ruling on the issue. I think, though, we would be better advised to proceed, let Mr. Hankinson pose to the witness his specific questions so that, upon review, they will know exactly what was asked and what was declined, in [40] other words, a continuing objection by the Prosecution, and we will simply need a comment for the record by the witness that he declines to answer on the ground previously stated.

MR. HANKINSON: Judge, if I might, having been trial attorney yourself, I want to make clear on the record my question probably, in the final analysis, if there is no answer for me to posit the next question on, will, to some extent, be disjointed. Once we get a ruling from the Court, if that were to go on to the Florida Supreme Court, it may be there are intermediate questions that may need to be asked to elaborate on an answer.

THE COURT: I would assume, Mr. Hankinson, that if there are questions that are declined to be answered by the witness, that you can comment for the record at that time, contingent upon the witness' answer to that question, the State would pursue that topic by further questioning along the lines of, and then –

BY MR. HANKINSON:

Q Thank you.

I believe the question that was initially posited to the witness, and just to set the stage, I think we were talking about the robbery case that you had previously represented Mr. Nixon on. The question was, have you discussed your trial strategy in that case with Mr. Nixon?

[41] A I would decline to answer that.

MR. HANKINSON: Judge, I would ask the Court to rule that that does not require the disclosure of confidential communications. It is a question simply asking yes or no. And I would ask the Court to so find and direct the witness to answer on that basis.

THE COURT: With respect to that question, I find it does not call for disclosure of confidential communications and, if it has so required, wouldn't have directed the witness to answer.

MR. STRICKLAND: Your Honor, if I may, I would like to chime in here. I want the record to reflect also from the Defendant's standpoint that the objection as to the questions about confidential communications between Mr. Corin and Mr. Nixon – of the objections, and I will just list them. There are several of them.

One of them, it's beyond the scope of the proceedings, which I indicated to the Court before.

Two, it's beyond the scope of any waiver which occurred last time,

And it's beyond the scope of the case which was cited by the Supreme Court, Turner.

THE COURT: And that is a continuing objection to the entire line of questions posed by the State, and specifically, you

readopt that objection on any occasion that the [42] witness declines to answer?

MR. STRICKLAND: Yes, Your Honor. Thank you kindly.

MR. HANKINSON: So, the Court directs the witness to answer the question.

THE COURT: Yes. And he has declined to do so.

BY MR. HANKINSON:

Q Is that correct, Mr. Corin?

A Right.

Q Assuming that the answer to the question would have been that he had discussed the strategy with Mr. Nixon, my question would be: Did Mr. Nixon have any input or involvement in the strategy?

A At this time, I would decline to answer that question.

Q The next question relates to the burglary charge that you had mentioned.

How was the burglary charge resolved?

A I think he was – I'm not positive, but I think he was found guilty as charged. I think it was an attempted burglary of a dwelling.

Q Okay. That was a trial proceeding?

A Yes.

Q And you represented him during the course of that trial, correct?

A Yes.

[43]Q Before trying the case, had you discussed your strategy in that case with the Defendant, Mr. Nixon?

A I would decline to answer that question.

Q I don't know whether we have to have the Court direct him to answer the question in each instance, or we will assume –

THE COURT: On those areas where he declines to answer, for record purposes it may be assumed that the Court would direct the witness to answer them unless I specifically note otherwise.

BY MR. HANKINSON:

Q Thank you, Your Honor.

Assuming that Mr. Corin would have answered that he had discussed strategy with Mr. Nixon, I would ask him did he participate in forming that strategy as to how to approach the burglary case?

THE COURT: Who is "he?"

MR. HANKINSON: Mr. Nixon.

THE WITNESS: At this time I would decline to answer.

BY MR. HANKINSON:

Q Did the Defendant participate in the trial of the burglary case?

A I really don't recall. I forget – are you specifically relating to whether he – did he testify?

Q Let me clarify that.

[44] First, did the Defendant attend in person the trial – and let's start with the robbery trial.

You said you started jury selection. Did he attend that trial in person and was present?

A Yes, sir.

Q Now, as to the burglary trial, did he attend that trial in person?

A To the best of my recollection, he did.

Q Did he participate in that trial by testifying on his own behalf?

A That I do not specifically recall.

Q Do you have any notes that you would be able to use to refresh your recollection on that point?

A I may.

But, again, that matter was prior to the trial of the murder case and I'm not sure if I – generally, I keep notes. But I'm not sure that the office still has them. If there is not an appeal, sometimes those things are destroyed.

Q Was the Defendant cooperative in the two cases that we have talked about in dealing with you, the robbery case and the burglary case?

A I would decline to answer that question.

Q How did you perceive Mr. Nixon's intelligence?

A I would decline to answer that question.

Q Decline to answer that on what basis?

[45]A Because my perception may well be based on the communication.

MR. HANKINSON: Again, Your Honor, I would ask that the Court make a finding that it does not relate to the disclosure of the confidential communications for the witness to testify what his observations of the Defendant's intelligence was. I think that is something clearly outside that area.

THE COURT: I think what Mr. Corin is doing is saying that it's a conclusion that he would have necessarily reached, or reached necessarily, as a result of confidential communications, and that is intrusive into the privilege. Therefore, he declines to answer it.

Mr. Strickland rises to object.

Sustain the objection. But, I would – excuse me. Overrule the objection and would direct the witness to answer the question.

MR. STRICKLAND: And also, Your Honor, note my continuing objection based on all of my objections as to this entire line of questions.

THE COURT: I continue to note your continuing objection to the continuing line of questioning.

MR. STRICKLAND: Thank you, Your Honor.

BY MR. HANKINSON:

Q What were your observations as to the Defendant's [46] ability to understand the justice system?

A I would decline to answer that question also.

Q Did the Defendant appear to have a knowledge of the judicial system?

A I would decline to answer that question also.

Q Assuming Mr. Corin would have said that he discussed strategies with Mr. Nixon, I would ask the question: Did Mr. Nixon defer to your recommendations and strategies on these two cases?

A I would decline to answer that question.

Q My recollection is the burglary case was still pending when the murder occurred. Is that correct?

A As I recall, Mr. Nixon's sentencing was pending at the time of the homicide.

Q How soon after the Defendant's arrest for murder did you get involved in representing Mr. Nixon?

A At this time, I don't recall, but –

THE COURT: On that case?

MR. HANKINSON: Right.

THE COURT: The murder case?

MR. HANKINSON: Right. I'm sorry if I was not clear. Let me restate –

THE COURT: He was involved in representing Mr. Nixon at the time the event occurred.

MR. HANKINSON: Right. I'm sorry. Let me clarify [47] the question.

THE WITNESS: I think I know what your question is. When did I first meet with Mr. Nixon concerning the homicide?

MR. HANKINSON: Right.

THE WITNESS: My best recollection is it probably was the day of his arrest.

BY MR. HANKINSON:

Q The day of his arrest.

A The evening of his arrest.

That is my best recollection at this time. I could check my notes on that.

Q How did you approach the investigation of the homicide case?

A I don't understand your question.

Q Well, how did you go about investigating the case? What action did you take to investigate the homicide case?

A You mean in terms of demanding discovery, deposing witnesses.

Q Your actions, yes, sir, as an attorney.

A I did what I usually do.

Q And which is what?

A Well, demand discovery, take depositions, review reports, consult with other lawyers.

Q Okay. Did you have an investigator assigned to [48] assist you in your investigation?

A You mean a public defender investigator or –

Q Yes, sir.

A Probably so.

Q Do you recall who was assigned to assist you?

A Not at this time.

Q How much of your time were you able to devote to the representation of Mr. Nixon on the homicide case?

A I – I don't know what to tell you.

Q I mean, the question goes as to how –

A Probably shockingly little, if you want to know my opinion.

Q At some point in time, were you relieved of other duties in handling the homicide case?

A I think I was relieved of answering phone calls and actively working on other cases from the time we began jury selection until the time the case was disposed of.

Q Did you depose all the material witnesses in the homicide case?

A One, I don't know what your definition is of "material." And I don't recall exactly who was deposed. I do recall taking a lot of depositions.

Q During the course of the homicide representation, did you meet with your client, Mr. Nixon?

A Yes.

[49]Q During the course of those meetings, did you discuss what you might possibly do in the way of investigation?

A I would decline to answer that.

Q Did you discuss any possible Defense witnesses with Mr. Nixon?

A I would decline to answer that question.

Q Approximately how many times did you meet with Mr. Nixon?

A I couldn't accurately tell you at this point.

Q Did you keep any notes of your meetings?

A Yes, I did.

Q Okay. Do you have those notes with you?

A Yes, I probably have all of them. I'm not sure.

Q I would ask that the witness produce notes at this time of his meetings with Mr. Nixon.

A I would decline to do that, Your Honor.

Q Based on the attorney-client privilege?

A That is correct. And work product.

Q I beg your pardon?

A And work product.

MR. HANKINSON: Okay. I would ask that we take a few minutes and allow Mr. Corin to review those notes.

THE WITNESS: Your Honor, it's going to take a lot more than a few minutes if you want me to review my notes.

THE COURT: What is the –

[50] MR. HANKINSON: The question relates to he indicated he could not at this point tell us even an approximation of how many times he met with Mr. Nixon or talked with him. I think that is an important consideration. So, if the only way he can do that is by looking back through his notes, I would ask that he be allowed to do that.

THE COURT: Well, the ruling of the Court is going to be that I am going to note the continuing objection of the Appellant, overrule the objection of the Appellant, require Mr. Corin to review his notes for the purpose of refreshment of recollection.

Mr. Corin declines to review his notes for refreshment of recollection because under the Florida Rules of Evidence if someone uses documents or items for refreshing their recollection, their counsel has the right to review the notes and inspect them and to examine the witness upon the items produced for the purpose of refreshment of recollection, which would circumvent the basis of this witness' declination to answer the question. Therefore, I would recognize that I would instruct him to review his notes and also recognize that he declines to review his notes for the same purpose.

MR. HANKINSON: Okay.

THE COURT: Is that correct, Mr. Corin?

THE WITNESS: Yes, Your Honor.

[51] BY MR. HANKINSON:

Q Did you form a strategy in how to approach the homicide case, the trial of the homicide case?

A Yes.

Q Okay. What was the strategy you decided to adopt in this case?

A I was trying to save Mr. Nixon's life.

Q And how did you decide to try to go about that?

MR. STRICKLAND: Your Honor, I would object as to that. That calls into play the four or five different objections that I brought into play and I object on all of those bases.

THE COURT: I'm going to overrule the objection, request the witness to answer that question and honoring his declination not to breach confidentiality, but I think it calls upon him to outline how he proposed to implement that strategy, which at this point would not be work product because the case has been concluded.

THE WITNESS: I think the best evidence of what I did in the case is a matter of record.

BY MR. HANKINSON:

Q Well, I would like for you to explain that to us just a little bit.

A Well, I don't understand.

You were at the trial. You know exactly what [52] happened.

Q Right. But, the Supreme Court was not there and I think one of the considerations is what is your strategy. So, I would like to have you elaborate, basically, what your strategy was.

A Well, I did not emphasize the guilt phase of the trial. My emphasis was on the penalty phase.

Q I'm sorry. I didn't hear what you said.

A My emphasis was on the penalty phase.

Q And how did you go about not – what was the word you said as to the guilt phase – not –

A Emphasis.

Q Okay. How did you go about trying to lessen the emphasis of the guilt phase.

A By, essentially, not contesting the State's case.

Q Okay. And how did you feel that that was advantageous to your client?

MR. STRICKLAND: Your Honor, I would renew my continuing objection on that. That is way past the scope of what we are here for. It's way past Turner.

THE COURT: Overruled.

THE WITNESS: I decline to answer that question.

MR. MARKY: Your Honor, I didn't hear the witness.

THE COURT: Rephrase that question specifically. I did not detect any area of breaching confidentiality in [53] that, as I heard the question. But, I would like you to rephrase it to make sure I understand it.

BY MR. HANKINSON:

Q You indicated that you had formed a strategy not to emphasize the guilt phase, and you did that by not contesting the witnesses. And my question was, how did you feel that was advantageous to your client, Mr. Nixon?

A I really don't know how to answer that question.

Q Well, you formed a strategy, correct, not to emphasize the guilt phase?

A Well, you – that is what I did, that is correct.

Q Okay. Why did you decide to do that?

A Because, in my opinion, there was not going to be any question but that, based on the State's evidence, the jury was going to find that Mr. Nixon had done what he was accused of doing.

Q I'm sorry. You kind of tailed off at the end.

A Because, in my opinion, based on the State's evidence, the jury was going to find that Mr. Nixon had done what the State accused him of doing.

Q Did you discuss your decision as to the guilt-innocence phase, of how you were going to approach that, did you discuss that with anyone else, such as other attorneys, other investigators, or –

A Your Honor, I would decline to answer that question [54] based on privilege and attorney work product.

THE COURT: Overruled.

THE WITNESS: The answer to your question is, yes, probably so.

BY MR HANKINSON:

Q Do you recall who you discussed it with?

A No, I do not.

Q Other people in your office?

A Perhaps.

Q Do you recall any one of the people that you discussed it with?

A Not specifically.

Q Is it common in your office, when serious case of this nature is pending, for the attorneys to more or less discuss strategy, how to approach the case?

A It is done. As to whether it's common practice, I can't say.

Q Now, what was your strategy in the penalty phase?

A I don't understand. I tried to have the jury be convinced to recommend a life sentence. That was my strategy.

Q Okay. But you said you tried – that was the end result that you wanted, and you tried to do that first in the guilt phase by not emphasizing the guilt phase?

A . Well, I don't know that I tried to get them to spare his life in the guilt phase. We hadn't even gotten to the [55] penalty phase yes.

Q My question is, what did you do in the penalty phase, what was your strategy in the penalty phase, to get the jury to spare his life?

A To advance to the jury matters that they would find mitigating.

Q What matters did you present that you considered to be possible mitigation?

A As I recall, there was a lot of prior records from training schools, HRS, Department of Corrections, psychological reports, matters that showed that very early on that Mr. Nixon had a problem and that that problem was never dealt with successfully.

Q Okay. So, was that your basic – what you were trying to convince the jury of?

You just elaborated that he had long-time problem that was never dealt with.

A Right.

Q Anything else that you were trying to convey to the jury?

A Can you be more specific?

Q Well, I'm just trying to say, were there any other points you were trying to get across to the jury other than the fact of this longstanding problem that was not dealt with in mitigation?

[56]A Do you have something – I'm trying to recall specifically what may have been introduced. And I think there would have been a prior – prior to the homicide, there was a phone call from Mr. Nixon I think to the sheriff where he tried to get them to come pick him up because he felt like there was a problem, and the officers declined to do that

Q Did you try to advance to the jury any problems that he had with his girlfriend, Wanda Robinson?

A I may have. I'm not specifically recalling.

Again, you probably reviewed the transcript, and I have not.

Q Okay. Did you present any psychological or psychiatric testimony to the jury?

A As I recall, I did.

Q And for what purpose were they presented?

A Mitigation.

Q Do you recall what point mitigation [sic] you were trying to advance?

A Mental difficulty, emotional difficulty.

Q Okay. I believe you previously testified on December 19th that you met and discussed your possible strategy with Mr. Nixon on at least three times.

A If that is what I testified then, that is the best of my recollection.

Q Did you keep any notes of these meetings?

[57]A Again, I have already answered that question.

Q No, I don't believe you have.

Did you keep any notes of specifically your meetings to discuss strategy in the homicide case with Mr. Nixon?

A I think you asked me if I kept notes of my contacts with Mr. Nixon. And I think I answered that I did.

Q Okay. Now, I'm asking an even more specific question as to those notes. Did you keep notes about meetings with Mr. Nixon where you discussed strategy?

A I may have notations to that effect.

Q And do you have those notes with you?

A I may.

MR. HANKINSON: Again, Your Honor, I would ask that those notes be produced.

THE WITNESS: Again, Your Honor, I decline.

THE COURT: Same ruling.

BY MR. HANKINSON:

Q Assuming that we were allowed to have those notes and have Mr. Corin review those notes, I would then ask him to elicit exactly what was said in those notes and to relate to us exactly what he told Mr. Nixon about strategy, having refreshed his recollection with his notes.

A Of course, I would decline.

MR. STRICKLAND: Of course, I would object, Your Honor, based on scope of proceedings, waiver, Turner, and [58] the attorney-client privilege.

THE COURT: Overruled.

BY MR. HANKINSON:

Q Do you recall what you told Mr. Nixon in reference to the strategy in the homicide case?

A I decline to answer that question.

Q Have you had a chance to –

THE COURT: That particular question I would require the witness to respond to, in that it does not call for any violation of any confidence at all. If I heard the question correctly, it was just simply "do you recall?"

MR. STRICKLAND: Your Honor, could I hear the question again, please?

THE COURT: Madam Court Reporter, would you read the question?

(WHEREUPON, THE COURT REPORTER REPEATED THE PENDING QUESTION)

THE COURT: The exact question is simply one that asks the present state of his recollection. It does not require that he reiterate the statement, comment on it at all. It's simply "do you recall."

He is going to decline to answer what it was. But, at least it can be asked does he even recall what he said. And I would require that the witness respond to that question in the context it was posed in.

[59] THE WITNESS: As to that question, I would say I don't now specifically recall.

BY MR. HANKINSON:

Q Do you recall the essence of what you told Mr. Nixon?

A Not specifically at this time.

Q Well, I'm not asking if you remember specifically word for word. Do you remember essentially what you told him about the strategy you were going to employ?

A Ask the question again, please?

Q You said you did not specifically remember what you said to Mr. Nixon. Let me clarify my question just a little bit.

Do you remember, in a general sense, what you told Mr. Nixon about the strategy that you intended to employ?

A Yes.

Q And, to reiterate, it's possible that you have notes to that effect?

A It's possible.

Q What did you tell him?

A I decline to answer that question.

Q How did he react to what you told him?

A I decline to answer that question.

Q Did he appear to understand what you told him?

A I decline to answer that question.

Q Did you explain to him what you were planning to do [60] in clear and concise language so he could understand?

A I decline to answer that question.

Q Did you ever get any reaction from him?

A I decline to answer that question.

Q How did you take this lack of reaction from him?

I'm assuming that, consistent with the prior testimony, he would tell us he got no reaction.

A You answered your own question at the end of the question.

Just rephrase it. Just state your question again.

Q I was clarifying for the record. We have prior testimony where you indicated that Mr. Nixon did not react to what you told him. You have already testified to that.

A In the December 19th testimony.

Q Any my question was, how did you take his lack of reaction?

A I don't know how to answer that question.

Q . Well, let me clarify a little bit.

Did you take his lack of reaction as him not understanding what you told him?

A I would decline to answer that question.

Q Did you take his lack of reaction as simply a negative reaction to having told him that he inevitably was going to be convicted?

[61]A I would decline to answer that question.

Q During the trial, did you talk with Mr. Nixon?

A Define "trial."

Q The trial of the homicide case. From when we first started jury selection until the penalty phase was over, did you consult with Mr. Nixon at all?

A Yes, I probably did.

Q Do you recall approximately how many times you talked with him.

A No, I do not.

Q Would you have any notes of conversations with Mr. Nixon during the trial?

A I may.

MR. HANKINSON: Again, I would ask, Your Honor, that he produce those notes.

THE WITNESS: I would decline.

THE COURT: Require that they be produced.

BY MR. HANKINSON:

Q Did Mr. Nixon remain with you in the courtroom during the course of the trial?

A No, sir.

Q What level of cooperation did you get from Mr. Nixon during the trial of the homicide case?

THE COURT: Just a moment.

I am not comfortable with that response. I think [62] that Mr. Nixon did remain with counsel through the earlier stages, very early stages, at which time he voluntarily absented himself.

From a cold record review several steps up, that could be inferred that he did not even attend the trial.

THE WITNESS: Would the court reporter repeat the specific question? I thought he said throughout trial.

THE COURT: No.

BY MR. HANKINSON:

Q No. I think I asked did he – I may have said that. I may have said did he remain with you during the course of the trial, and you indicated no. Perhaps we should clarify that.

Was Mr. Nixon present at the trial in person when the trial began, when jury selection began?

A Well, again, I – as I recall, he was when jury selection began.

Again; you have the record and the record will show when he was and wasn't there. I don't have that record and I don't presently, independently recall when he was specifically there and when he was not specifically there.

Q But, you do recall that during some parts of the trial he was present and other parts of the trial he was not present?

A Yes.

Q Did you have any discussion with Mr. Nixon as to [63] whether it was advantageous or disadvantageous to him for him to attend the trial?

A I would decline to answer that question.

Q What level of cooperation did you get from Mr. Nixon during the course of the homicide trial?

A I would decline to answer that question.

Q Did he ever give you any directions as to how he wanted you to conduct the trial?

A I would decline to answer that question.

Q Did he ever make any objection to how you told him you intended to approach the trial?

A I would decline to answer that question.

A I would decline to answer that question.

Q Did you give him the opportunity to object to what you intended to do?

A I would decline to answer that question.

Q Did you give him the opportunity to make suggestions about the strategy of the trial?

A Decline to answer that question.

Q Did you want his input in how to proceed in the trial?

A Yes.

Q Before you went to trial, did you pursue plea negotiations with the State?

A Yes.

Q How did you go about doing this?

[64]A I requested negotiations.

Q And basically, who were you negotiating with?

A My last recollection is Mr. Guarisco.

Q Okay. What did you offer to plead to?

A Probably offered to plead no contest or guilty to all offenses charged for all day.

Q I'm sorry. The last part of that was what?

A Vernacular. Plead to everything for all day, meaning no release.

Do you want to know what the answer was?

Q . Yes.

A "Let's roll the dice."

Q Now, why did you offer to plead your client to life in prison?

A Considering the alternative, it would have been a righteous result.

Q Did you ever discuss these negotiations with your client, Mr. Nixon?

A Decline to answer that.

Q Did he make any comments?

A Decline to answer that.

Q How did the Defendant not attending parts of the trial impact on your ability to consult with him?

A Well, I can't consult with you, Mr. Hankinson, if you are not in the room, can I?

[65]Q So, it had a negative impact on your ability to consult with him?

A Well, I was unable to consult with my client if my client was not physically present.

Q Did you ask the Defendant to attend trial?

A Decline to answer that.

Q What did he tell you when you asked him, assuming that you asked him to attend?

A Decline to answer that question.

Q Did you consider the possibility – in the guilt phase, we have discussed your strategy. Did you consider the possibility of presenting various defenses, specifically, denial of the offense or affirmative defense or a reasonable doubt defense or some type of insanity defense?

A I probably considered everything.

Q And why did you choose not to pursue any of those strategies?

A Decline to answer that question.

MR. HANKINSON: I think that calls not for consultation with his client, Your Honor, but why he chose to take a particular course. I fail to see how that impinges on the attorney-client privilege.

MR. STRICKLAND: Your Honor, it clearly does. We don't know the answer, but there are a number of ways he could reach his conclusion – work product, discussions [66] with his client. There is no telling what it might involve, but certainly Mr. Corin has already made the declination, so his reasons are based on attorney-client privilege.

THE COURT: Overrule the objection, require that the witness answer the question.

He, nonetheless, declines to answer it.

BY MR. HANKINSON:

Q Did you consider that it enhanced your credibility with the jury to not contest guilt in this case?

A I really can't specifically answer that question. I mean, I know what you are getting at. There are theories that go both ways.

I generally take no position on the credibility of lawyers.

Q Do you think the credibility of the lawyer with the jury – maybe I wasn't specific enough – is an important factor during the trial?

A There are those that believe that it is.

Q Do you hold that belief?

A Well, let's just say I would not want to ever do anything in front of a jury which would damage my credibility in terms of misleading them or causing them to arrive at a result through tainted evidence.

I don't know what – I think I know what you are [67] getting at in terms of there are people who believe that the credibility of a lawyer can be destroyed if an affirmative defense is advanced and rejected at the guilt phase; and, thus, they want to bring in another lawyer at the penalty phase.

I am not one who believes that, if that is your question.

Q Okay. Do you think that it would have been disadvantageous to your standing with the jury for you to have said in the guilt phase that Mr. Nixon was not guilty, to assert that to the jury?

A I'm not sure.

Q In adopting the strategy that you took in this case, did you consider the fact that others might later second-guess your strategy?

THE COURT: Excuse me, Mr. Hankinson.

The order of the Supreme Court did give the Court leave to inquire. And I take it that you are leaving what you consider to be the credibility position.

MR. HANKINSON: Certainly, Your Honor.

EXAMINATION

BY THE COURT:

Q I think I understand perhaps part of your comment about the efficacy of a lawyer's credibility with the jury. You commented that the lawyer's responsibility is not to mislead the jury by artifice, trick, false inference, and the like.

[68] There is one school of thought, which I recognize differences of opinion, that deals with the credibility of the lawyer in what I might call a personality context, and that is that the jury will see an individual attorney somehow in a light that if the individual attorney posits a position, it must be true or viable because he or she is the one who said it and we know that he or she would not posit that position because they are paragons of integrity.

There is another facet of that. If I recall correctly, and if I heard you correctly, part of your earlier testimony was that you did not give emphasis to the guilty or not guilty phase of the case, in part because your strategic objective was to save Mr. Nixon's life and that that issue would be met during the penalty phase and that your overall approach in the penalty phase, or part of that approach, was that Mr. Nixon, in part, had been shaped by the society in which he lives, which includes all of us, that help had not been extended to him at times when help could have been extended, that there were not corrective or remedial increments that were put into place and, therefore, find those to be mitigating factors with the result of a remedy for a life sentence instead of the electric chair.

I might have taken some license with that. But, to [69] some degree, is that not relatively correct?

A I don't know.

Q Assuming that you don't know, but pursuing that further, you did intend to de-emphasize the guilty or not guilty phase so that you could stress the mitigating factors that you perceived possibly available to you in the penalty phase?

A I don't think that is quite correct.

Q What would be quite correct?

A I try not to assess the guilt or innocence of any client. That is not my job. I am not stupid as either a lawyer or human being, so I must assess the status of a given client's case based upon what I know to be admissible facts from the prosecution.

So, to the extent that de-emphasis of the guilt phase would assist in minimizing those facts which might inure to the benefit of my client at the penalty phase of the trial, that is what I tried to do.

Q Now, I think the end line of where I was going in the context of credibility was not so much believability, but the objective of not having a jury have a dissident reaction to the penalty phase presentation, at least retaining some receptivity to the position that you were positing.

A Well, but, see, I don't think that really is – in any given case, the evidence can be so structured that [70] regardless of what the lawyer may or may not do at any stage, is not going to change the jury recommendation.

So, it's not the – it's hard to say it's not whether you defend the guilt phase and the jury says, well, we don't buy that, so we are not going to listen to a thing he says. That is not the whole of the story.

Let me give you – I'm trying to – let me give you a for instance.

Q Okay.

A The way I generally have defended cases since I have been a defense lawyer is that less is more, and that when I am attempting to defend any case, when I stand to say something in front of the jury, I want them to pay attention to me. Thus, I don't hop up and down, as a general rule, if I know that my objection is going to be overruled, or is otherwise quasi-frivolous. I don't ask questions on cross-examination generally if I don't have a purpose because when I talk, I want them to listen and I don't want them to say, here comes that jack-in-the-box again. So, to that extent, if that enhances somebody's credibility, so be it.

If it does not, so be it.

Q Looking at it from two different facets, one would be the lawyer's credibility, perhaps vis-a-vis a jury's receptivity to whatever position the lawyer may be positing, and how do you keep them receptive. I perceive that your [71] strategic thrust on this case, as you evaluated it, was in the penalty phase with the strategic position of keeping Mr. Nixon out of the electric chair. How you prefaced the presentation so that at least they may or may not be receptive in the penalty phase has to be a factor for consideration.

A Right.

THE COURT: Okay.

CONTINUED DIRECT EXAMINATION

BY MR. HANKINSON:

Q May I go back just a little bit further on that point, if I could.

I would like to refer the witnesses, if I may approach the witness – show you part of the transcript. I'm on page 1038, Lines 18 through 23.

May I approach the witness?

THE COURT: You may.

BY MR. HANKINSON:

Q I represent to you this is part of your closing argument in the penalty phase. I am referring to this paragraph starting out, "Now, today it's Thursday."

Would you just read that paragraph for us, please, at this point?

A Just the next to last paragraph on Page –

Q Right. Starting out "Today is Thursday."

A "Now, today is Thursday. The trial has lasted about [72] a week. All I have ever asked of you is to keep your mind open. I never asked more than that. I promised you I would not try to misrepresent anything to you and I think I have, to the best of my ability, kept that promise."

Q Now, you made a point there that you had promised not to misrepresent anything to them. Did you consider that to be an important part of your strategy in this case?

A I think that is an important consideration in any case.

Q Did you feel that the strategy that you took emphasized your ability to be able to make that type of statement to the jury?

A Not necessarily.

Q Okay. Explain that.

A Well, I mean, I don't ever intentionally misrepresent anything. And I think I try to use that to my advantage, if I can, in any case.

MR. HANKINSON: I'm going to move on unless you have further questions in that area.

THE COURT: No.

BY MR. HANKINSON:

Q As you tried this case, the homicide case, did you consider the fact that others might later second-guess your strategy?

A Yes, sir.

[73]Q Do you think lawyers should make strategic decisions based on what other may later say about their strategic decisions?

A No, sir.

Q Did you employ what you believed to be at the time the best possible strategy for representing this Defendant, Mr. Nixon?

MR. STRICKLAND: Your Honor, I would object on that question. There is a lot of components that may enter into that, including confidential communications with Mr. Nixon.

THE COURT: Overruled.

THE WITNESS: I decline to answer.

MR. HANKINSON: I mean, Judge, that question has nothing whatsoever to do with attorney-client privilege.

THE COURT: Just a moment.

In the context of the preceding questions, and that is that lawyers do not make strategic decisions based on what others – and that is very broad – others may think about the soundness or the wisdom of that decision, Mr. Corin has answered that, and I think correctly, no, and that you make those decisions professionally at the time based on what is presented to you professionally, without regard to what others may think about it, quite frankly at the time or what they might think about it later.

[74] In that context, I think you have asked Mr. – or if I understand it, you have asked Mr. Corin, in retrospect, do you think that was the appropriate strategic position.

In essence, that is what I perceived it to be.

In that context, I would overrule the objection.

MR. HANKINSON: My question was not in retrospect. My question was, did he employ what he believed to be the best possible strategy at the time even given those considerations that I mentioned, which he has asserted to, that he might be second-guessed. And I think it's a perfectly appropriate question consistent with what you have said.

THE WITNESS: I decline to answer the question.

MR. HANKINSON: On the basis of attorney-client privilege?

THE WITNESS: Yes, sir.

MR. HANKINSON: I would like to have a ruling of the Court whether that –

THE COURT: I think his response to the question that you have outlined is consistent with his prior recollection.

The basis of that ruling, Mr. Hankinson, is that if your question is, in retrospect, considering what everyone else has said, does he have second thoughts about it, and that implies that he has considered legal issues that are presently before the Court, both at this level and above, [75] I would accept his declination. I will under the ruling request and instruct him to answer.

If your question is, regardless of whether anyone has said anything about it or second-guessed, does he look back and consider his strategy to have been sound, that does not take into account what other people may think or may not think, but his own subjective consideration, I would say that falls outside the attorney-client privilege and instruct the witness to answer.

MR. HANKINSON: I'm sorry?

THE COURT: Go which way you want to go.

MR. HANKINSON: That's all the questions I have at this time, Your Honor.

THE COURT: Cross, Mr. Strickland?

MR. STRICKLAND: No. Thank you, Your Honor.

THE COURT: Thank you, Mr. Corin.

THE WITNESS: Yes, sir.

THE COURT: Are there other witnesses?

MR. HANKINSON: Yes, sir. I would call Tony Guarisco to the stand.

MR. STRICKLAND: Your Honor, I would like to interpose an objection. The objection is that this also – Mr. Guarisco's testimony will be beyond the scope of the three orders that we have indicated and certainly beyond any kind of – anything he may have to say is beyond the [76] parameters that the Court is interested in knowing, particularly in light of the fact that the Court has indicated that the issue is the issue which I raised in the Supreme Court, which had to do with the matter which is a part of the record and the protective order which I referred to this morning.

THE COURT: Overruled.

Swear the witness, Mr. Clerk.

(WHEREUPON, THE WITNESS WAS SWORN BY THE CLERK)

MR. STRICKLAND: Your Honor, I want to make it quite clear the nature of my objection. The objection is that the issue raised on appeal was brought pursuant to U.S. vs. Cronic, is not ineffective assistance of counsel brought pursuant to 3.850. It is exclusively the issue, which the Court is well aware of, that I brought to the Supreme Court. Anything that Mr. Guarisco may have to say clearly goes beyond the three issues, which I won't go over, but are found in the February 1st, 1989 order, which the Court is aware of.

On that basis, we would object.

Thank you, Your Honor.

MR. HANKINSON: I have no objection to that being a continuing objection, Your Honor.

THE COURT: Well, it would have to be a continuing objection because I haven't heard any of the questions [77] that have been asked and I don't know whether they do or not. For all I know, Mr. Guarisco's testimony may be, I talked to Mr. Corin, Mr. Corin told me he had talked with Mr. Nixon and Mr. Nixon said A, B, C, D and E.

MR. STRICKLAND: Well, Your Honor, it is a continuing objection. But, I will object periodically if the Court – I can just indicate my objection and the Court notes those are my objections.

THE COURT: Certainly. That is your objection and at the time you wish to interpose it, just simply rise and note the continuing, previously stated objected.

MR. STRICKLAND: Thank you, Your Honor.

THE COURT: All right. Mr. Hankinson?

MR. MARKY: The Court overruled the objection, Your Honor?

THE COURT: The Court is not ruling on the objection because I don't have anything to rule on.

MR. STRICKLAND: Actually, Your Honor, it's also the calling of Mr. Guarisco.

THE COURT: Well, the Supreme Court's order, the last one, authorized the State to call witnesses. They are calling a witness. I don't know what the witness is going to say. I don't know whether the witness is going to discuss the weather or this case. So, I don't – I understand your objection. I am just saying I have nothing to [78] apply the objection to.

MR. STRICKLAND: Thank you, Your Honor.

THE COURT: He hasn't even been asked his name yet.

MR. STRICKLAND: Thank you, Your Honor.

MR. HANKINSON: We will take are of that problem, Your Honor.

THE COURT: Good.

WHEREUPON,

ANTHONY GUARISCO

was called as a witness, having first been duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HANKINSON:

Q Would you state your name, please?

A Anthony Guarisco.

Q And how are you currently employed?

A I am the Deputy State Attorney, Second Judicial Circuit.

Q What does it mean to say that you are Deputy State Attorney?

A I am, in essence, the chief assistant in charge of operations.

Q So, you are the second-in-command of the office?

A Right.

[79]Q Tell us, if you would, just briefly, first, your educational background.

A I received a Bachelor's degree from the University of Tampa. I received a juris doctorate degree from South Texas College of Law.

Q When was that?

A 1970. And the Bachelor's degree in 1967.

I have attended numerous courses of the National School of Prosecutors and also the Florida Prosecutors Association, including the Career Prosecutor's Course and the Executor Prosecutor's Court.

Q Okay. If you would, since your graduation from law school, if you would just briefly run through were [sic] you worked, what your position was.

A In 1970 to '71, I was with the legal staff of the State Treasurer's Office.

Between 1971 and 1974, I was Assistant State Attorney here in the Second Judicial Circuit.

From 1974 to 1981, I was an Assistant State Attorney in the Thirteenth Judicial Circuit and also Special Prosecutions Bureau Chief.

From 1981 to 1983, I was Deputy State Attorney here in the Second Judicial Circuit.

From 1983 to 1985, I was Chief Assistant State Attorney in the Thirteenth Judicial Circuit.

[80] And, of course, from 1985 to present, Deputy State Attorney here in the Second Judicial Circuit.

Q The Thirteenth Circuit, that is Tampa?

A That is Tampa.

Q Okay. During the course of your involvement as a prosecutor since 1971, have you had occasion to participate in the trial of any capital cases?

A I have tried in my career about 15 capital cases, actual trials.

Q Have you had other involvement in other homicide cases in the offices?

A Well, I have presented a great number of capital cases to the grand jury, in particular in Tampa, and also participated in investigations of homicide cases while in Tampa.

Also, in the capacity as Chief Assistant, Deputy State Attorney, I have counseled with attorneys concerning capital cases that they are handling.

Q Can you in any way estimate the number of homicide cases that you have been involved in to the extent that you are aware of the factual matters and had some participation in their presentation?

A That would be a hard question for me to answer because, I mean, we are talking about great numbers, in particular down in Tampa.

[81]Q Now, you were one of the Prosecutors assigned to handle the State vs. Joe Nixon case; is that correct?

A That is correct.

Q And you were one of the trial attorneys?

A That is correct.

Q If you would, relate to us, please, how you viewed the strength of this particular case?

MR. STRICKLAND: Your Honor, with that, I would interpose my objection.

THE COURT: Overruled.

MR. STRICKLAND: Thank you, Your Honor.

THE WITNESS: Okay. This is probably one of the cases in my career that I believe was really tight. It had just about everything that a prosecutor could dream of as far as evidence.

There was overwhelming evidence in this case. The Defendant's background – as far as being a death penalty case, not only did we have overwhelming evidence, we also had a Defendant's background to consider and the innocence of the victim and the gruesomeness of the case. So, this was a very, very strong case evidentially.

I mean, in this particular case, we had the Defendant being seen with the victim prior to the murder, we had the Defendant being seen after the murder driving the victim's automobile, we had the Defendant's finger-[82]prints on the victim's automobile, we had the Defendant making statements to numerous individuals, including a long confession to law

enforcement, we had him identified, in essence, pawning the ring that was taken from the victim.

It was just overwhelming.

BY MR. HANKINSON:

Q Were they any plea negotiations in this case?

A Yes. Mr. Corin approached me –

MR. STRICKLAND: Your Honor, I would at this time on this – I think we have a steady line of questions that are coming and I would like to note particularly at this time a continuing objection based on the previous objection made.

THE COURT: Overruled.

BY MR. HANKINSON:

Q Did you have any plea discussions in this case?

A Yes, I did.

Q Who were those with?

A They were with Mr. Corin, who was at that time representing Mr. Nixon.

Q Relate to the Court, please, what the nature of the plea discussions were.

A In essence, Mr. Corin offered to plead to everything as charged. The only thing was to spare Mr. Nixon from the [83] death penalty. He would plead to first-degree murder for minimum mandatory 25 years, and, in essence, said that we could ask for the moon as far as other charges, we could

habitualize him, we could seek the maximum sentence on the other charges.

Q And did you agree to enter into that plea?

A At that time, of course, I told him that I would discuss it with you. And then we had another discussion wherein he again made the offer and I, as usual when I'm discussing these matters with defense counsel, asked how his client felt about it. And he indicated that his client would –

MR. STRICKLAND: I object to that, Your Honor.

THE WITNESS: – plead.

THE COURT: Overruled.

MR. STRICKLAND: Your Honor, that calls for him to be testifying as to what somebody else said.

THE COURT: I understand that.

MR. STRICKLAND: Thank you, Your Honor.

MR. HANKINSON: I don't know whether the court reporter was able to get his answer. It was kind of simultaneous with the objection.

Do I need to repeat that, Your Honor, the end of his answer?

THE COURT: I heard it.

MR. HANKINSON: If you got it and the court reporter [84] got it down, fine.

Basically, he indicated that his client agreed to do this?

THE WITNESS: Yes.

BY MR. HANKINSON:

Q What was your decision as to whether to enter into the plea as proposed by Mr. Corin?

A My decision was that we would not accept his plea offer, that due to the overwhelming evidence of this case and the severity of this case, that this was a death penalty case and that we would proceed accordingly and go to trial, seek a conviction, and if the jury convicted and Defendant then we would seek the death penalty.

Q Now, I believe you indicated that you were one of the Prosecutors that actually tried this case; correct?

A That is correct.

Q And we have heard testimony somewhat today, and more so back on December 19th, about the strategy employed by Mr. Corin not to cross-examine the witnesses or contest the State's evidence. Is that your recollection of basically how Mr. Corin approached the guilt phase?

A Yes.

Q As a Prosecutor of the case, did that cause you any strategic problems or concerns?

A Well, when that happened in the courtroom, of course, [85] many thoughts ran through my mind. This is, in essence, the first time that I have ever personally witnessed this in a trial. Many questions run through your mind, such as how is the jury going to look at us proceeding with our case and presenting all the evidence that we had to present, will the jury think that we are going to be engaging in overkill. And people

might say, or the jury might say, why are you presenting all this evidence when the Defense attorney, in essence, said there would be no doubt in this case.

There was a lot of evidence that we had. And we had to decide how much of this evidence do we put in because we were obligated – Mr. Corin's statement, if I recall, at the beginning was there would be no doubt that the State would prove the case, which meant that we still had to prove the case. So, that meant we had to prove the elements of all the charges in the indictment. So, we had to present evidence and we also had to take into consideration that the evidence that we presented in trial would also be used in a subsequent proceeding, the penalty proceeding dealing with the establishment of certain aggravating circumstances that we would advance to the jury. And, in essence, what we had was a low-key defense presented by Mr. Corin, and so we had to be very cautious as to how we proceeded. And we didn't want to be overly dramatic and we also had to be very careful in our presentation of the case as to whether or not we would get involved in creating any [86] error in the record.

So, all of these things ran through my mind and, of course, we had discussions of it as we proceeded.

Q Okay. Based on this low-key approach that you talked about by Mr. Corin, did you may any adjustments in how the evidence was presented to the jury?

A Well, obviously we had to present our evidence. And the evidence that we presented, of course, was not a pretty picture. However, there were a number of witnesses that had relevant information that could have testified at trial that we chose not to put on. And, also, there were witnesses that we did put on that we could have gotten a lot more evidence out of and we chose not to go any further but just to establish certain basic facts to help prove our elements of the offenses.

Q Do you recall any specific testimony that was not offered during the guilty-innocence phase that you considered to be particularly relevant evidence but, for strategic reasons, was not called during that time?

A Well, we had a number of witnesses to whom Mr. Nixon made statements. We also had another law enforcement officer aside from the ones that he gave the confession to. We had Detective Livings that had a very incriminating statement taken from the Defendant that we chose not to introduce in the guilt phase of the trial. And that was the Defendant's statement that he removed the victim's underwear or panties to [87] terrorize her. That, of course, would have been, in our consideration, a very dramatic thing to present that we chose not to present in the guilt phase and later on, of course, presented it in the penalty phase.

There was a witness by the name of Evelyn Harris. She was put on to testify about seeing the Defendant in the victim's car. However, she could also have testified about the statements that the Defendant made to her that he had killed a white woman, which was I believe through a phone conversation that she had with the Defendant, who was then incarcerated.

Virginia Meeks could have been called regarding seeing the Defendant in the victim's car. And the Defendant showed her the rings that he took, he said "From his girlfriend." She was not put on.

She could have also identified the ring. And these rings that I'm talking about were the rings of the victim.

Judith Hill wasn't called. She could have testified about, again, seeing the Defendant in the victim's car.

JoAnn Plachy, who was a very close friend of the victim, who knew her very well, who knew her jewelry, and she knew

the jewelry the Defendant had, knew the car and so forth, she could have been put on to identify the automobile that belonged to the victim, which the Defendant was driving. She could have been put on to identify the rings that belonged to [88] the victim, which the Defendant pawned. She could have been put on to identify a picture or a photograph of the victim prior to the murder.

Also, there was a key found in a burned pile at the crime scene, in the vicinity of where the victim was tied up and burned. That key belonged to Ms. Plachy. It was, I believe, a key to her residence. And that evidence could have been presented and was not.

Q Okay. About Mrs. Plachy, how would you have – talking about the type of testimony this would have been, in terms of low-key, emotional. What kind of testimony would we have gotten from Mrs. Plachy in identifying the victim and identifying these other items?

A It would have been very emotional. She was very close to the victim and very emotional over this situation.

THE COURT: Mr. Strickland?

MR. STRICKLAND: We kind of – Mr. Hankinson's movement is drifting into –

THE COURT: I'm going to admonish counsel. I think I have heard enough about the State's case.

I'm curious about the facet of the State's case in light of the manner in which the defense case was conducted.

MR. HANKINSON: What I think Mr. Guarisco indicated is that these were adjustments that were made in the case [89] partially as a result of this strategy, as I understood it.

THE COURT: No problem that you have outlined that. I'm just saying let's move along.

MR. HANKINSON: Okay. We are almost through, as a matter of fact.

THE COURT: No, we are through.

MR. HANKINSON: Okay.

MR. STRICKLAND: Thank you, Your Honor.

BY MR. HANKINSON:

Q So, basically, these are adjustments that had to be made in the case based on the Defense's strategy?

A Yes, sir.

MR. HANKINSON: Those are all the questions I have, Your Honor.

THE COURT: Mr. Strickland?

MR. STRICKLAND: No. Thank you, Your Honor.

THE COURT: You may step down.

You have an additional witness, I see, in the form of Mr Simpson.

MR. HANKINSON: Yes, sir.

Mr. Marky has an agonized look on his face and asks that we take five minutes.

MR. STRICKLAND: I would stipulate to it.

THE COURT: How long do you expect Mr. Simpson's testimony will be?

[90] MR. HANKINSON: About 30 minutes.

THE COURT: All right. Let's take about a – I would guess it would take five minutes.

(WHEREUPON, A BRIEF RECESS WAS HELD)

THE COURT: Am I correct the State now intends to call Mr. Simpson as an expert witness in the field of effective assistance of counsel?

MR. HANKINSON: That is correct, Your Honor.

THE COURT: Mr. Strickland objects?

MR. STRICKLAND: Yes, Your Honor, I object. As I indicated, this goes beyond the Cronic issues, beyond the scope of the proceedings, beyond the issues I raised at the Supreme Court, has no relevancy on those bases, no relevancy to either the orders, the limited orders, the three issues the Court has raised in its February 1st, 1989 order and my issue on direct appeal.

Thank you, Your Honor.

THE COURT: All right. Overruled.

Mr. Clerk, swear the witness.

(WITNESS SWORN)

MR. STRICKLAND: Your Honor, if I could note that as a continuing objection. I would object to all – since the Court has indicated and the State has – the State rather has indicated that it's for the purpose of expert testimony, I would object on

those bases as a continuing [91] matter. Would the Court note that on each and every question that he asks in that regard?

THE COURT: So noted.

MR. STRICKLAND: Thank you, Your Honor.

THE COURT: All right. You may proceed.

WHEREUPON,

LARRY SIMPSON

was called as a witness, having first been duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HANKINSON:

Q State your name, please.

A My name is Larry Simpson.

Q And if you would, Mr. Simpson, give us a brief outline of your educational background.

A I attended undergraduate school at Florida State University and graduated in 1971 with a BS degree. I then attended Florida State University College of Law. I graduated in December of 1973 with a juris doctorate degree with high honors.

Q After finishing law school, set out for us your legal background.

A My employment has basically consisted of two positions. The first position that I held was that of an [92] Assistant State Attorney in the Second Judicial Circuit. I went to work with the State Attorney's office on January 2nd, 1974, and continued in that employment until May 31, 1980, at which time I went into private practice with a law firm that at that time was known and Davis and Judkins. And I have been with that firm ever since June 1st of 1980. It is now known as Davis, Judkins and Simpson.

Q All right. As a prosecutor, outline to us, if you would, the types of cases that you have handled.

A I handled every conceivable case there was to handle at the trial court level, everything from juvenile, traffic court cases. I have tried jury trials involving what is now traffic infractions. I have tried juvenile hearings. I have tried competency proceedings, Baker Acts. I have tried misdemeanor cases, routine traffic court cases. I have tried minor felonies and major felonies, several homicide-type cases.

At the time I left the State Attorney's office in May of 1980, I was in charge of the Career Criminal Unit and was also handling special prosecutions, having been appointed by the Governor's Office to handle special prosecutions in other circuits throughout the state.

Q During your time as a prosecutor, you indicated you handled trials. Approximately how many trials did you indicate you had handled?

A I cannot even guess. I would have to be somewhere [93] in the range of hundreds.

Q What about capital cases as a prosecutor?

A As a prosecutor, I actually had two first-degree murder cases that went to a penalty phase. I handled many first-degree murder cases that, for one reason or the other, did not actually reach the penalty phase.

Q But, how many that actually went to the penalty phase?

A Two.

Q What two cases were those?

A One was the case that arose in Jefferson County. The Defendant's name as [sic] Joe Goodwin. And that ultimately resulted in an [sic] life sentence.

The other case was Theodore Robert Bundy, the Chi Omega homicide case that was transferred from Leon County to Miami, Florida, for the trial, which ultimately resulted in the death penalty.

Q And you were lead counsel in that counsel?

A Yes, I was.

Q Now, you indicated now that you are with a private law firm. What type of practice are you in there?

A I do any kind of trial work, primarily criminal defense work, in either state or federal court, along with the appellate work that goes with unsuccessfully defending criminal cases.

[94]Q How many criminal cases would you estimate you have handled as a defense attorney?

A Again, it would be hundreds. I have tried many of those cases. Most of the ones I would say that I have actually tried since being in private practice have been relatively complex and lengthy trials.

Q Okay. About how many would you say you probably have tried?

A I would say somewhere in the range of about 15 to 20.

Q What about have you handled any capital cases as a defense attorney?

A Yes. None that have reached the penalty phase though.

Q Have you tried several that started out as first-degree murder cases?

A Yes, I have.

Q Do you remember how many?

A I would say approximately three, perhaps four. There was one case where I represented more than one defendant at any particular point in time. The case was actually tried four times.

Q And in each of those, you successfully avoided the penalty phase?

A Yes.

Q What courts are you currently admitted in?

A I'm admitted to practice in all state courts in the [95] State of Florida. I am also admitted to practice before the United States Supreme Court, before the Fifth, Sixth and Eleventh Circuit Court of Appeal, and before the Northern District of Florida.

Q And where have you argued or tried cases?

A I have argue and tried cases all over the State of Florida from Key West to Pensacola to Jacksonville. I have also argued or tried cases in the States of Alabama, Georgia, Virginia, Ohio, and Kentucky.

Q And are you a Board-certified criminal trial lawyer?

A Yes. I am Florida Bar Board-certified in criminal law.

Q What did you have to do to obtain that status?

A I had to submit an application which required proof of the number of cases that I had actually tried and been involved in; in other words, experience in the field of criminal trial law. I also had to establish that I had maintained sufficient continuing legal education during the period that the certification would apply to. And I also had to stand and complete and pass the Criminal Law Certification Examination.

Q Okay. And you did so?

A Yes.

Q How many other private lawyers in Leon County are Board-certified in criminal law?

[96]A I am the only one except for Bob Harper, who is Board-certified as a criminal appeals lawyer. I am the only Board-certified criminal trial lawyer in this county that is in private practice.

Q Have you had an occasion to handle any collateral proceedings, 3.850 proceedings?

A Yes, I have.

Q As a defense attorney?

A Yes.

Q Okay. Where was that?

A I have handled a couple of them. One that comes to mind is one that was handled over in Dixie County, Florida, where there was an allegation of ineffective assistance of counsel.

Q What was the result there?

A The case was reversed on the 3.850 motion and the Defendant was immediately released from prison, with all charges being resolved.

Q Have you done any appellate work relating to 3.850 proceedings?

A Yes, I have.

Q Do you remember how many cases you have been involved in?

A I can recall one that I did appellate work on, but I don't recall any others. I have done many appeals in [97] criminal cases.

Q What is your Martindale-Hubbell rating?

A A-B [sic].

Q Have you taught or lectured any in the field of trial work or criminal law?

A Yes, I have.

Q Where and outline what you have done.

A From 1981 to 1985 I taught as an adjunct professor at the Florida State University College of Law teaching Criminal Clinical Orientation. That is a preparatory course for all law students who intend to intern in either the State Attorney's office or Public Defender's office. It's essentially a criminal trial practice course where the students are taught how to handle criminal cases.

I have also lectured on many, many occasions. I lectured as part of the Florida Bar's continuing legal education program on several occasions. And on one occasion I lectured on prosecuting and defending complex criminal cases.

I have also lectured on two occasions before the American Academy of Forensic Scientists, on one occasion before the Southeastern Association of Forensic Scientists, and various other professional groups including the Florida Prosecuting Attorneys Association. And about three or four months ago I lectured before the California District Attorneys Association in their Homicide Seminar.

[98]Q Are you currently a member in any organization and, if so, any offices held there?

A Bar-related organizations. I am a member of the Florida Bar. And in that capacity, I served from I believe it was 1983 through 1985 on the Grievance Committee of the Second Judicial Circuit, the last year of which I served as Chairman of that committee.

I am also a member of the Tallahassee Bar Association and served as President of that organization during the year 1987.

Q Okay. Are you a member of any defense attorney associations?

A Yes. I'm a member of the American Criminal Defense Lawyers Association. I'm also a member of the Second Circuit Criminal Defense Lawyers Association, as well as the Florida Association of Criminal Defense Lawyers.

Q Based on that, do you receive any legal updates in criminal law?

A Yes. As a matter of fact, probably the best publication that I receive is part of the continuing legal education, and which all lawyers should be involved in, is a publication that is put out by the American Criminal Defense Lawyers Association that is really on the cutting-edge of what the law is right now.

Q So, you keep current in the criminal law area?

[99]A I sure do.

Q Have you ever been retained as an expert witness in a case before this?

A Yes.

Q What kind of case was this?

A I have not yet testified in that case. It is a civil case wherein a lawyer is being sued by his former client on a claim of ineffective assistance of counsel in a criminal case.

Q And who have you been hired by?

A The Plaintiff's attorney is Ed Blanton, and I have been retained by his firm.

MR. HANKINSON: At this time, Your Honor, I would tender Mr. Simpson as an expert in the field of criminal trial practice.

THE COURT: In what field?

MR. HANKINSON: Criminal trial practice.

THE COURT: Mr. Strickland concedes the expertise of the witness in the field, nonetheless, objects to the testimony proffered by this witness; am I correct?

MR. STRICKLAND: I object to his testimony, Your Honor. Thank you.

THE COURT: All right. Accept his credentials in the field of criminal law, am prepared to receive opinions with respect thereto.

BY MR. HANKINSON:

[100]Q Mr. Simpson, at my request, did you do some review of the case before the Court, State of Florida vs. Joe Elton Nixon?

A Yes, sir, I did.

MR. STRICKLAND: Your Honor –

THE COURT: Do you wish to pose your continuing line of objections?

MR. STRICKLAND: My continuing line of objection as I noted prior to the beginning of Mr. Simpson's testimony.

Thank you, Your Honor.

THE COURT: So noted.

Same ruling.

BY MR. HANKINSON:

Q In that respect, would you just outline to the Court basically what you did?

A Yes. I reviewed the entire record on appeal that I was provided, which included a transcript of the trial and the trial hearings that were conducted in the case. I also reviewed a copy of a tape recorded statement that apparently the Defendant gave to Larry Campbell of the Sheriff's Department.

I also reviewed two reports that were rendered by the psychiatrists who were involved in the case. And I also reviewed a transcript of the last hearing in this case, the December 19, 1988, transcript. And I have also had the benefit [101] of having heard the testimony that was given today.

Q And upon entering into this, what was your understanding or agreement with the State?

A Simply that I would review all the material and reach an opinion about whether or not Mike Corin rendered ineffective assistance of counsel and advise you of what that opinion was, whether it was, in my opinion, reasonably effective or not.

Q Based on the investigation you did and the experience that you outlined, did you come to an opinion as to Mr. Corin's effectiveness?

A Yes, I sure did.

Q And what was your opinion?

A In my opinion, Michael Corin rendered effective assistance of counsel to the Defendant in the defense of this case.

Q Okay. If you would, elaborate on that, and how you arrived at that opinion.

A There are actually two factors that are involved in it. The first factor is that I found that there was no, in my opinion, serious deficiency in the manner in which Mr. Corin conducted the defense of this case that was below the standards of competent counsel. That is the first factor.

The second factor is that, even assuming that there was a serious deficiency in Mr. Corin's conduct of the defense of this case that was below that of competent counsel, that it, [102] nevertheless, had no effect whatsoever on the outsome [sic] of the case.

Q Explain what you mean by that.

A What I mean is that, as Mr. Guarisco testified, and which is also my opinion, the evidence in this case is absolutely overwhelming. Mr. Corin could have cross-examined

the witnesses during the guilt phase of this case until he turned blue and it would have done absolutely no good.

This case involves a situation where, as best I can count, this Defendant confessed having committed this crime to at least seven different people that I can count from the transcript. At least four of those people that he confessed to, he gave extensive confessions, detailing facts and circumstances of the crime. And as part of one of those confessions, the tape recorded confession that he gave to Larry Campbell of the Sheriff's Department, that confession, in my view, goes into excruciating detail to the point where there was absolutely no doubt whatsoever that the Defendant Joe Nixon killed Jeanne Bickner.

As a matter of fact, I think Judge Hall probably said it as well as anybody. He commented at one point on the record that "This case was proven not only beyond a reasonable doubt, this case was proven beyond all doubt." And I think that is essentially what we have here.

What Mike Corin did was to recognize that this case [103] was essentially one trial that may have had two phases that are involved in it. And what Mr. Corin did was to select the issue that really had to be tried in this case and try that issue. And, quite frankly, I don't think that there was a better strategy that could have been employed in the defense of this case than the one that Mr. Corin employed.

Q Now, early on in your consideration of this case, as I recall, you made one specific request of me for certain reports. Do you recall that?

A Right. I requested that you provide me with the psychiatrists' reports.

Q And why did you request those specific reports?

A Because it was of some concern to me to determine whether there was some mental type defense that could be interposed in this particular case.

Q In you review of those reports and the trial testimony, did you find anything that Mr. Corin overlooked?

A Not that he overlooked that he could have presented in the guilt-innocence phase of this case. I think that he did an excellent job of presenting that testimony though in the penalty phase of the case. And that is exactly where it needed to be.

MR. HANKINSON: Your Honor, if I could have just a moment.

THE COURT: Yes, sir.

[104] MR. HANKINSON: That's all the questions I have at this time, Your Honor.

MR. STRICKLAND: Thank you, Your Honor.

Joe Elton NIXON, Appellant.

v.

STATE of Florida, Appellee

No. 67583.

Supreme Court of Florida.

Nov. 29, 1990.

Rehearing Denied Jan. 24, 1991.

Defendant was convicted in the Circuit Court, Leon County, J. Lewis Hall, J., of first-degree murder and sentenced to death. On appeal, the Supreme Court, Ehrlich, J., held that: (1) trial was properly allowed to proceed in capital murder defendant's absence; (2) photographs of victim were admissible; and (3) defendant was not entitled to instruction informing jury of maximum sentences for other crimes of which he had been convicted as mitigating factor.

Affirmed.

T. Whitney Strickland, Jr. of Oven, Gwynn & Strickland, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., and Patricia A. Conners, Gary L. Printy and Richard B. Martell, Asst. Attys. Gen., Tallahassee, for appellee.

EHRLICH, Justice.

Joe Elton Nixon appeals his conviction of first-degree murder and sentence of death for the 1984 murder of a

Tallahassee woman. He also appeals his convictions of kidnapping, robbery, and arson and the trial court's departure from the recommended guideline sentence for those convictions. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm the convictions and sentences.

On Monday, August 13, 1984, the charred body of Jeanne Bickner was found tied to a tree in a wooded area in Leon County. The next morning Ms. Bickner's car, the interior and trunk of which had been gutted by fire, was found in a Tallahassee drainage ditch. The same day, after receiving information from Joe Elton Nixon's girlfriend, Wanda Robinson, and brother, John Nixon, that he had admitted the killing, had been driving the victim's car prior to burning it, and had pawned two of her rings, Tallahassee police arrested Nixon. Nixon was charged with first-degree murder, kidnapping, robbery, and arson.

At trial, there was testimony that after church on August 12, 1984, Ms. Bickner went to a local mall to have lunch with friends. She parked her orange M.G. convertible in the mall parking lot. Ms. Bickner was later seen in the parking lot giving a black man jumper cables from the trunk of her car. Witnesses testified that on the afternoon of August 12 they saw the orange M.G. driven by a black male, later identified as Nixon, near the vicinity of the site where the body was found. Ms. Bickner's body was discovered by a couple riding through the woods who reported the incident to the police. The charred body was in a seated position tied around the waist with jumper cables to a pine tree. Wanda Robinson, John Nixon and other witnesses testified that they saw Nixon driving Ms. Bickner's orange M.G. Robinson and John Nixon also testified that Nixon admitted killing a white woman by tying her with jumper cables and burning her. Nixon also showed them two of Ms. Bickner's rings and later said he had pawned the rings. Robinson and John Nixon also testified that on the morning of the fourteenth, Nixon told them that he was going to burn the orange M.G. There was

testimony that Nixon attempted to sell the M.G. prior to burning it. A pawn shop receipt signed by Nixon for two of Ms. Bickner's rings was entered into evidence. A laboratory analyst for the Florida Department of Law Enforcement testified that Nixon's palm print was found on the trunk lid of Ms. Bickner's M.G.

After his arrest, in a taped confession which was played to the jury, Nixon admitted murdering Ms. Bickner. He described how he met Ms. Bickner at the mall and asked her to take him to his uncle's house because he was having car trouble. Once on the road, Nixon hit Bickner in the face. When she stopped the car, Nixon put her in the trunk and then drove to a secluded wooded area where he took her from the trunk and tied her to a tree with jumper cables. According to Nixon, the two talked about their lives. Ms. Bickner offered to give Nixon money, to sign her car over to him, begging him not to kill her. Nixon recounted how he burned Ms. Bickner's personal belongings and then threw the top of the convertible into the fire. At some point after placing a paper bag over her head, Nixon threw the smoldering convertible top on Ms. Bickner, setting her on fire. He then left the scene in the M.G. According to the medical examiner, Ms. Bickner was alive at the time she was set on fire and the fire was the cause of death. The jury convicted Nixon of the offenses charged. In accordance with the jury's recommendation, finding five aggravating factors[1] and no mitigating factors, the trial court imposed the death penalty.

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[1] The trial court found the following aggravating factors:

1) the defendant was previously convicted of another violent felony;
2) the murder was committed while the defendant was engaged in the commission of a kidnapping;
3) the murder was committed for pecuniary gain;
4) the murder was especially heinous, atrocious, or cruel; and
5) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Nixon raises seven claims in connection with the guilt phase of the trial and eight claims in connection with the penalty phase. Of the fifteen claims raised only nine merit discussion.[2]

GUILT PHASE

Nixon's first claim is that he was denied effective assistance of counsel when his trial counsel, without record approval of Nixon, conceded Nixon's guilt and sought leniency. This claim is based on the following comments by counsel made during opening statement and closing argument. In opening statement, defense counsel stated:

> In this case, there will be no question that Jeannie [sic] Bickner died a horrible, horrible death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt.
>
> In this case, there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it

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[2] The following claims do not merit discussion: 1) that section 921.141, Florida Statutes (1983), is unconstitutional;2) that the trial court erred by refusing to omit the words "a possible doubt" from the standard jury instruction on reasonable doubt; 3) that the penalty - and guilt-phase instructions impermissibly diminished the jury's sense of responsibility for its sentencing recommendation, in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); 4) that the trial court erred in failing to permit Nixon to make a statement at the sentencing proceeding; 5) that it was error for kidnapping and robbery to be considered in determining guilt and also used as an aggravating factor; and 6) that the trial court erred in barring prospective members of the jury from service without adequate inquiry under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.

During closing argument defense counsel made the following comments:

> Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case. In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous. I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson.

Nixon takes the position that counsel's statements were the functional equivalent of a guilty plea, requiring a record inquiry as to whether he knowingly and voluntarily consented to this strategy. Nixon argues that this concession of guilt resulted in a 'complete breakdown in the adversarial process which resulted in a complete denial of his right to counsel' and therefore constitutes ineffective assistance per se under the

United States Supreme court's decision in United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). See e.g., Wiley v. Sowders, 647 F.2d 642 (6th Cir.) (petitioner was deprived of effective assistance of counsel when defense counsel admitted petitioner's guilt, without first obtaining petitioner's consent to the strategy), cert. denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981); People v. Hattery, 109 Ill.2d 449, 94 Ill.Dec. 514, 488 N.E.2d 513 (1985) (defense counsel is per se ineffective where counsel concedes defendant's guilt, unless the record shows that the defendant knowingly and intelligently consented to this strategy), cert. denied, 478 U.S. 1013, 106 S.Ct. 3314, 92 L.Ed.2d 727 (1986); State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985) (it is per se ineffective assistance of trial counsel where counsel admits defendant's guilt without the defendant's consent), cert. denied, 476 U.S. 1123, 106 S.Ct. 1992, 90 L.Ed.2d 672 (1986).

Over Nixon's objection, this Court remanded to the trial court for an evidentiary hearing to determine whether Nixon was informed of the strategy to concede guilt and seek leniency. Order of October 27, 1987. After a second order of this Court, dated October 4, 1988, clarifying the procedure to be followed in connection with the evidentiary hearing, the defendant was allowed to present witnesses but the state was not. The state's cross-examination of Mr. Corin, Nixon's trial counsel, was limited to the scope of direct examination by the defense. Because the trial court did not interpret the order of October 4, 1988, as requiring him to make findings or conclusions, none were made. On further remand by order of February 1, 1989, the state was allowed to present witnesses. However, the state's examination of Mr. Corin was extremely limited due to his refusal to testify concerning matters not already addressed during his testimony for the defense absent Nixon's waiver of the attorney-client privilege. Nixon refused to waive the privilege and the state was unable to fully examine Mr. Corin.

We recognize the confusion resulting from our remand for these atypical proceedings and decline to dispose of this claim on the present state of the record which we view as less than complete.[3] Accordingly, we do so without prejudice to raise the issue in a later motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850.

As his second claim, Nixon contends that the prosecutor made an impermissible "Golden Rule" argument when he told the jury 'we have an obligation to make you feel just a little bit . . . of what Jeanne Bicker [sic] felt.' In closing argument during the guilt phase of the trial, the prosecutor stated:

> I noticed sometimes people wonder about and I guess have different ideas on what makes a prosecutor tick. You probably wonder: Well, do Mr. Guarisco and I enjoy the fact that we're presenting this horrid thing to you. I assure you we don't.

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[3] The trial court found the following pursuant to our order of February 1, 1989:

1. Trial Defense Counsel Corin reviewed with Defendant/Appellant Nixon the defense approach to the case in general terms including, but not limited to, the probability that he would concede the killing of the victim by Nixon.

2. Corin and Nixon had previous attorney-client relationships, both were veterans of the criminal justice system and although Nixon manifested no reaction, he understood what was to take place.

3. Nixon made no objection and did not protest the strategy and tactic employed at trial.

Based on the foregoing, this Court concludes that the Defendant/Appellant Nixon has not sustained his burden of proof by the applicable standard that he (a) was neither informed nor knew of the trial strategy and tactic employed by Defense Trial Counsel Corin nor (b) did not consent thereto or (c) acquiesce therein.

> Yet, at the same time, we have an obligation to make you feel just a little bit, just a little bit, of what Jeanne Bicker [sic] felt because, otherwise, sometimes I think it's easy to forget that. And the emotions involved in this case - and they are there. There are emotions going both ways in this case.
>
> Hopefully, those emotions on the one hand where you are talking about imposing, well, the most serious penalties we have against a person which is an emotional thing are counterbalanced by the emotions of the terrible thing that's happened in this case. And then as a group of 12 people you can set this aside, set that aside and you make an objective decision. You follow the law that the Judge gives you because that's what we need you to do.

At the close of the state's argument, defense counsel moved for a mistrial, noting "at this time to instruct the jury to disregard it would be to no avail." After having the comment read back to the court reporter, the trial court denied the motion stating, "I don't think that's a Golden Rule argument. I think it's close, but I don't think that's a pure Golden Rule argument."

Initially, we note that defense counsel failed to make a contemporaneous objection to the above remarks which were made at the commencement of the state's argument. Ordinarily, to preserve a claim based on improper comment, counsel has the obligation to object and request a mistrial. If counsel fails to object or if, after having objected, fails to move for a mistrial, his silence will be considered an implied waiver. Clark v. State, 363 So.2d 331, 335 (Fla. 1978), abrogated on other grounds, State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). In connection with closing argument, a motion for mistrial need not be made in the next breath following the objection to the offensive remark. This

rule avoids interruption in the continuity of the argument and affords defendants an opportunity to evaluate the prejudicial nature of the objectionable remarks in the context of the total argument. State v. Cumbie, 380 So.2d 1031, 1033 (Fla. 1980).

Nixon argues that under Cumbie, his motion for mistrial at the close of argument, absent a contemporaneous objection, was sufficient to preserve this issue for appeal. We do not construe Cumbie to obviate the need for a contemporaneous objection. The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of the judicial system. A contemporaneous objection places the trial judge on notice that an error may have been committed and thus, provides the opportunity to correct the error at an early stage of the proceedings. Castor v. State, 365 So.2d 701, 703 (Fla. 1978). While the motion for mistrial may be made as late as the end of the closing argument, a timely objection must be made in order to allow curative instructions or admonishment to counsel. As noted by defense counsel in this case, in many instances a curative instruction at the end of closing argument would be of no avail. Accordingly, defense counsel's motion for mistrial at the end of closing argument, absent a contemporaneous objection, was insufficient to preserve this claim under our decision in Cumbie. Even if the issue were properly preserved, we agree with the trial court that taken in context the comments complained of did not amount to a Golden Rule argument.

Nixon's third claim is that his absence during critical proceedings at various times throughout the trial requires reversal of his conviction and sentence. On July 8 and 9, 1985, Nixon refused to be present during a hearing on various pretrial motions. In both instances counsel waived Nixon's presence for the limited purpose of hearing the motions. Although Nixon was present at the commencement of jury selection on July 15, 1985, as voir dire continued on the morning of July 16, 1985, Nixon refused to enter the courtroom. Defense counsel explained to the

judge that Nixon had disrobed to his underwear, and was demanding a black judge and a black attorney, and did not wish to return to the courtroom. After a recess, Nixon still refused to attend the trial. The trial judge then inquired of the bailiff as to why Nixon had not returned. The judge was informed that Nixon had told another officer that he was not going to court 'for them to railroad me.' Defense counsel informed the judge that Florida Rule of Criminal Procedure 3.180(b) allowed a defendant to voluntarily absent himself from the courtroom if the court chose to try Nixon in absentia. The trial court conducted a hearing in the holding cell to determine if it would be in Nixon's best interest to allow him to absent himself from the proceedings. During the hearing, Nixon was clad only in his underwear. He reiterated to the judge that he did not wish to return to the courtroom, that he wanted another attorney and wanted to return to the jail-house. Nixon threatened that if forced to return to the courtroom, "I still [sic] run my mouth and speak when I get ready unless you tape it up." Nixon repeatedly stated that he wanted to return to the jail-house and did not care if the trial proceeded without him. After questioning the officer who had transported Nixon from the jail to the holding cell concerning the events leading up to appellant's removal of his clothes and desire to return to the jail-house, the trial court indicated that if Nixon did not return to the courtroom that afternoon, the court would consider his decision "to be a knowledgeable, voluntary and intelligent waiver of his right to be present during the course of the trial." When Nixon refused to return to the courtroom that afternoon, the court found that Nixon had knowingly, intelligently, and voluntarily waived his attendance and that the proceedings would continue without him.

> I have considered options including but not limited to, I think, the most severe step which is to compel the attendance of the Defendant by physically forcing his attendance in the courtroom, if necessary to manacle, bind and gag and the like.

> It's my view that Mr. Nixon does not want to come to the courtroom. And to bring him into the courtroom under those circumstances would be manifestly prejudicial to this case. Therefore, I'm going to accede to his desire not to participate.
>
> It's my view that we have done about as much as can possibly be expected to seek to accommodate attendance for him. To induce him to attend. We've even recessed Court for a period of time so that he might reflect upon that decision. That has been to no avail.

During voir dire, defense counsel asked prospective jurors if Nixon's absence would affect their impartiality and all replied that it would not. Thereafter, Nixon refused to attend most of his trial.

In Peede v. State, 474 So.2d 808, 814 (Fla. 1985), cert. denied, 477 U.S. 909, 106 S.Ct. 3286, 91 L.Ed.2d 575 (1986), we held that "a defendant can waive his right to be present at stages of his capital trial if he personally chooses to voluntarily absent himself." It is clear from the record that Nixon did not wish to attend the proceedings, threatening to disrupt them if so forced. A defendant will not be forced to attend his capital trial if his actions or the means used to ensure his presence would prejudice him in the eyes of the jury. As in Peede, the trial judge in this case took every precaution to ensure that Nixon's absence was voluntary. A hearing was held in Nixon's holding cell. A recess was initially taken to allow Nixon time to reflect on his decision. Counsel was allowed to question the prospective jurors to ensure Nixon's absence would not prejudice him. At various intervals throughout the proceedings the trial judge questioned a custodial officer to ascertain whether Nixon had evidenced a change of mind, which he had not. Under these circumstances, it was not error to p[illegible]oceed with the trial in Nixon's absence.

During the guilt phase of the trial seven photographs of the victim were entered into evidence over defense counsel's objection. Nixon contends that the admission of an "unnecessarily large number of inflammatory photographs" of the victim in a charred state resulted in a fundamentally unfair proceeding. He maintains that "there was no justifiable relevancy for the admissibility of the photographs since the cause of death and nature of death had been clearly established and there was no circumstance which necessitated the introduction of photographs of the victim." The test of admissibility of photographs such as these is relevancy rather than necessity. Gore v. State, 475 So.2d 1205, 1208 (Fla. 1985), cert. denied, 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 348 (1986). Four of the photographs, exhibits 10G, 10H, 10K, and 10J, showing various positions of the victim's charred body tied to a tree at the crime scene were introduced by the state during the testimony of Deputy Gunter. The photographs were introduced to aid the detective in explaining the condition of the crime scene when the police arrived. See id. (allegedly gruesome photographs of victim relevant to show condition of the body when first discovered by the police and to show considerable pain inflected on victim). The other three photographs, exhibits 12, 13A, and 13B, which were taken at the coroner's office and which show the victim's head and upper body were introduced during the pathologist's testimony. These photographs assisted the pathologist in explaining the nature of the victim's injuries and the cause of her death. See Bush v. State, 461 So.2d 936, 939 (Fla. 1984) (photographs are admissible where they assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted), cert. denied, 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986).

We do not agree that the seven photographs admitted, none of which were cumulative, constituted an unnecessarily large number of inflammatory photographs. Cf. Young v. State, 234 So.2d 341 (1970) (error to admit forty-five gruesome photographs of the victim), receded from on other grounds, State

v. Retherford, 270 So.2d 363 (Fla. 1972). Nixon is correct that the challenged photographs are extremely gruesome; they accurately depict the fact, as noted in the trial court's sentencing order, that "Jeanne Bickner was the victim of a vicious, barbaric and savage murder." However, because the photographs are not so shocking in nature as to outweigh their relevancy, the trial court did not abuse its discretion in admitting them. Bush, 461 So.2d at 940.

We also find no merit to Nixon's next claim that the trial court erred in failing to establish the competency of a juror who was excused from service during the penalty phase of the trial due to emotional problems. The jury returned its verdict of guilty on Monday, July 22, 1985. On Wednesday, July 24, during the penalty phase of the trial, the trial judge was informed by the bailiff that he was concerned about Juror number 12, who was exhibiting "strange" behavior. With counsels' concurrence the trial judge decided that Juror number 12 should be monitored. At this point, defense counsel expressed concern that if Juror number 12, who was black, was removed from the jury it might upset the "representative mix" which had been achieved. Defense counsel also expressed concern that if the juror's problem was not a new one, it could have affected the jury's guilt determination. The next day, the bailiff informed the court that it had been difficult to get Juror number 12 ready to come to court because she locked herself in the bathroom. The bailiff also informed the court that he had learned that "a few years ago" Juror number 12 had a nervous breakdown and that she was "in the process of taking Lithium." According to the bailiff, the bizarre behavior was first manifested on Tuesday afternoon, July 23, the day after the conclusion of the guilt phase of the trial. The trial court determined that Juror number 12 should be replaced by an alternate. The court concluded that "the condition of Juror No. 12 did not manifest itself until the conclusion of the guilty/not guilty phase. I see no reason to disturb that facet of the case."

We agree with the state that the issue was not properly preserved for review. Although defense counsel evidenced concern that Juror number 12's problems may have affected the guilt phase of the trial, counsel never sought further judicial inquiry. Counsel did not object to the trial court's conclusion that Juror number 12's condition did not manifest itself until after the guilt phase of the trial was completed nor did he move for a mistrial. In fact, defense counsel acknowledged that "the onset of [Juror number 12's] symptoms was apparently post-guilt phase" and that "there is no clear indication" that Juror number 12 had mental problems that could have affected the jury's guilt-phase deliberations. Counsel also declined to voir dire Juror number 12 before the matter was concluded. Further, even if the issue had been preserved, there was insufficient evidence that Juror number 12 likely suffered from incompetence during the guilt phase to warrant further inquiry. See United States v. Mauldin, 714 F.2d 854 (8th Cir. 1983) (absent substantial if not wholly conclusive evidence of incompetency, such as proof of an adjudication of insanity or mental incompetence made shortly before or after the trial, courts will not set aside a verdict or make further inquiry into a juror's competency during trial); United States v. Dioguardi, 492 F.2d 70 (2d Cir.) (same), cert. denied, 419 U.S. 873, 95 S.Ct. 134, 42 L.Ed.2d 112 (1974).

PENALTY PHASE

Nixon's first claim in connection with the penalty phase of the trial concerns a statement made by Nixon after his arrest to Detective Livings concerning the removal of Ms. Bickner's underwear. During the penalty phase of the trial, Detective Livings testified that between 8:00 and 9:20 p.m. on the day of Nixon's arrest he asked Nixon about the victim's underwear. According to the detective, Nixon told him he had removed them because he wanted to scare her. Nixon maintains that the

statement was inadmissible because it was given without full benefit of Miranda[4] warnings. We cannot agree.

There is no requirement that an accused be continually reminded of his rights once he has intelligently waived them. Bush v. State, 461 So.2d at 939. Nixon had been given full Miranda warnings on at least four separate occasions prior to his taped confession, twice at the time of his arrest, once in route to the police station, and once at 12:20 p.m. prior to giving the taped confession. Each time he stated that he understood his rights and prior to giving the taped confession he executed a written waiver which has not been challenged. Approximately eight hours after giving the taped confession, Detective Livings told Nixon that he had a question to ask him. The detective advised Nixon "that [Nixon] didn't have to talk with [him]; that [Nixon] did not have to give [him] any information; that [Nixon] still had the right to remain silent." After being reminded of his rights, Nixon indicated his willingness to speak with Detective Livings by stating "I got no problems talking with you." Although the detective did not give Nixon a full Miranda warning, the trial court correctly ruled that Nixon understood his rights and knowingly and intelligently waived them prior to the challenged statement and that his statement that he had no problem discussing the case was a valid waiver.

We also reject Nixon's claim the trial court erred in failing to instruct the jury on mitigating factors under sections 921.141(6)(b) (defendant was under the influence of extreme mental or emotional disturbance), 921.141(6)(f) (capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired), and 921.141(6)(g) (age of defendant at the time of the crime), Florida Statutes (1985). Nixon argues that although defense counsel requested that no instructions be given on

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[4] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

statutory mitigating factors, the trial court had a duty to so instruct because there was evidence of each of these factors. Defense counsel specifically requested that only the following instruction be given:

> The mitigating circumstances which you may consider are unlimited, and you may consider any evidence presented at trial and during the sentencing proceedings in mitigation of the defendant's sentence.

Since defense counsel requested that the instructions to which Nixon claims he was entitled not be given, he cannot now take the position that it was error to fail to give them. Further, while it may have been preferable to have instructed on the statutory mitigating factors urged, the catchall instruction given served as an adequate vehicle to allow the jury to consider all the mitigating evidence presented.

In connection with the above claim, Nixon also maintains that the trial court impermissibly refused to consider the mitigating evidence presented. While the trial court found that there was no evidence to support these mitigating factors, it is clear from the record that the court considered and rejected all the evidence presented.

Nixon next claims that the trial court erred in refusing to give a requested instruction informing the jury of the maximum sentences for kidnapping, robbery, and arson. During the penalty phase of the trial, defense counsel requested such an instruction, stating that he wanted "to be able to argue those potential punishments to the jury as part of the theory of defense." The trial court denied the request, noting that the jury obviously knew that it had convicted Nixon of the three other felonies. The court expressly noted that defense counsel was entitled to argue in mitigation that Nixon stood convicted of the other serious

felonies. Defense counsel reiterated his objection to the court's refusal to give the requested instruction.

Nixon maintains that the fact that he was convicted of three other offenses which carried lengthy maximum penalties was a circumstance on which the jury should have been instructed under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Florida Rule of Criminal Procedure 3.390(a) provides that "[e]xcept in capital cases, the judge shall not instruct the jury on the sentence which may be imposed for the offense for which the accused is on trial." This rule has been construed to mean that the jury need only be instructed as to the possible penalty when it is faced with the choice of recommending either the death penalty or life imprisonment. As to offenses in which the jury plays no role in sentencing, the jury will not be advised of the possible penalties. Coleman v. State, 484 So.2d 624, 628 (Fla. 1st DCA 1986).

As we recently noted in King v. Dugger, 555 So.2d 355, 359 (Fla. 1990), "Lockett requires that a sentencer 'not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" The fact that Nixon was convicted of three other offenses each of which carried lengthy maximum penalties is irrelevant to his character, prior record, or the circumstances of the crime. Therefore, the trial court did not err in refusing to give the instruction. Even if it had been appropriate for the jury to be instructed on the maximum penalties for the other crimes, the requested instruction merely set forth the maximum sentences for each of the noncapital offenses. The instruction did not inform the jury that it could consider the maximum sentences for the noncapital offenses as a mitigating factor. The jury was aware of the noncapital offenses for which Nixon was convicted, counsel urged those convictions as mitigation, and the jury was instructed that the factors which it would consider in mitigation were unlimited.

GUIDELINES DEPARTURE

In connection with the kidnapping, robbery, and arson convictions, the trial court departed from the recommended guideline range of twelve-to-seventeen years, sentencing Nixon to consecutive terms of life imprisonment for kidnapping, fifteen years for robbery, and fifteen years for arson. The court based departure on the following: 1) the "[e]motional trauma suffered by the victim and her fear and emotional distress;" 2) Nixon's "escalating pattern of criminal conduct culminating in the instant offense;" 3) Nixon's status as an habitual offender; and 4) "[a]ny other reasons articulated by this Court at the sentencing hearing."

We agree that reasons 3 and 4 are not clear and convincing reasons for departure. Winters v. State, 522 So.2d 816 (Fla. 1988); Whitehead v. State, 498 So.2d 863 (Fla. 1986); State v. Jackson, 478 So.2d 1054 (Fla. 1985), abrogated on other grounds, Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), receded from on other grounds, Wilkerson v. State, 513 So.2d 664 (Fla. 1987). However, we have held reasons 1 (emotional trauma) and 2 (escalating criminal conduct) to be clear and convincing under appropriate circumstances. In Tillman v. State, 525 So.2d 862, 864 (Fla. 1988), we explained that

> emotional trauma of the victim, may serve as a clear and convincing reason for departure where there is evidenced "a discernible physical manifestation resulting from the psychological trauma," State v. Rousseau, 509 So.2d 281, 284-85 (Fla. 1987), or where there is evidence that the trauma is the result of "extraordinary circumstances which are clearly not inherent in the offense charged." Casteel v. State, 498 So.2d 1249, 1253 (Fla. 1986).

While there was no evidence of a physical manifestation of psychological trauma because the victim in this case died at the scene, there is credible evidence that after being abducted, Ms. Bickner was tied to a tree and terrorized before being burnt alive. These are extraordinary circumstances causing emotional trauma which are clearly not inherent in the crimes of kidnapping or robbery. Cf. Ochoa v. State, 509 1115 (Fla. 1987) (emotional trauma not clear and convincing reason for departure where there were no "extraordinary circumstances" clearly not inherent in the crime of kidnapping causing the trauma).

Reason 2 (escalating pattern of criminal conduct) is a valid reason for departure, Keys v. State, 500 So.2d 134 (Fla. 1986), which is supported in this case by evidence of Nixon's prior criminal history. As a juvenile, Nixon was adjudicated delinquent six times in connection with various charges of shoplifting, petit larceny, grand larceny, possession or sale of stolen property, first-degree arson, possession of burglary tools, and burglary. As an adult, Nixon was convicted of armed robbery in 1980, burglary of a structure in 1981, attempted burglary of a dwelling in 1984 and the offenses for which he now stands convicted: arson, robbery, kidnapping, and murder.

While reason 4 (any other reasons articulated at sentencing) is not a clear and convincing reason for departure under our decision in Jackson, 478 So.2d at 1055-56, there did not appear to have been other reasons articulated at the sentencing hearing upon which the departure could have been based. Because we find beyond a reasonable doubt that the trial court would have departed in the absence of the invalid reasons, we need not remand for resentencing. Albritton v. State, 476 So.2d 158 (Fla. 1985).[5]

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[5] While our decision is not based on this factor, we note that Nixon's conviction of first-degree murder, a capital felony which cannot be scored as an additional offense at conviction, could have served as a valid reason for departure. Torres-Arboledo v. State, 524 So.2d 403, 414 (Fla.), cert. denied, 488 U.S. 901, 109 S.Ct. 250, 102 L.Ed.2d 239 (1988); Hansbrough v. State,

Accordingly, Nixon's convictions and sentences are affirmed.

SHAW, C.J., and OVERTON,

McDONALD, BARKETT, GRIMES and KOGAN, JJ., concur.

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509 So.2d 1081, 1087 (Fla. 1987).

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA,

vs. CASE NO. 84-2324

JOE ELTON NIXON,

Defendant.
_____/

ORDER DENYING MOTION
FOR POSTCONVICTION RELIEF

This cause came before the Court on the Defendant's Motion for Post Conviction Relief filed pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The Court having considered the matter, having reviewed the court file and being otherwise fully advised finds that the motion should be denied without a hearing.

1.) The following issues are denied as legally insufficient or procedurally barred as they were either raised and rejected or could have been raised on direct appeal:

a.) Defendant was denied due process of law and the constitutional right to a fair trial under the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution because (A) the State tried him without first determining his competency to stand trial, and (B) the State tried him while he was incompetent.

The issue of a defendant's competency to stand trial is not cognizable in a motion for post conviction relief because it is

an issue which should or could have been raised on direct appeal. See, **Lopez v. Singletary**, 634 So.2d 1054 (Fla. 1993); **Johnson v. State**, 593 So.2d 206 (Fla. 1992); **Medina v. State**, 573 So.2d 293 (Fla. 1990); **Rosier v. State**, 655 So.2d 160 (Fla. 1st DCA 1995).

b.) The State violated Fla.R.Crim.P. 3.210 - 3.215 when it tried Mr. Nixon without first following the procedures and conducting the psychiatric examination required by those rules.

This is also an issue which could or should have been raised on appeal. See, **Lopez**, **supra**; **Johnson**, **supra**.

c.) Defendant who suffers from organic brain damage and other psychiatric disorders, was denied a competent mental health examination and counsel was ineffective for failing to investigate for information necessary for such an examination, in violation of his rights under Article I, ss. 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The issue of whether the court appointed evaluations were insufficient is an issue which could or should have been raised on direct appeal and is therefore procedurally barred. See, **Lopez**, **supra**; **Johnson**, **supra**. The issue of whether counsel's omission to provide the experts with the required information constituted ineffective assistance of counsel will be addressed under the ineffective assistance of counsel claims.

d.) Defendant's jury weighed invalid and unconstitutionally vague aggravating circumstances, in violation of his right to an individualized and reliable sentencing proceeding, as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, ss. 9, 16, and 17 of the Florida Constitution.

Defendant refers the Court to **Espinosa v. Florida**, 112 S.Ct. 2920 (Fla. 1992) and **Sochor v. Florida**, 112 S.Ct. 2114 (1992). Both cases held that in a state where the sentencer weighs aggravating and mitigating circumstances in determining whether to impose the death sentence, the weighing of an invalid aggravating circumstance violates the eighth amendment. Defendant argues that two of the five aggravating circumstances about which the trial court instructed the jury were unconstitutionally vague. Although the supreme court upheld the trial court's findings of the aggravating factors, Defendant contends that the Florida Supreme Court did not conduct any review of the effect of the error in the instructions to Defendant's jury on the "heinous, atrocious, or cruel," or "cold, calculated and premeditated," aggravating factors.

Defendant argues that this issue may be raised in a 3.850 motion because it is a fundamental change in Florida Law. Defendants cites **James v. State**, 615 So.2d 668 (Fla. 1993), wherein the supreme court granted relief based on an **Espinosa** claim in a 3.850 proceeding. That court in **James** held that claims arguing that the instruction on the heinous, atrocious, or cruel aggravator is unconstitutionally vague are procedurally barred unless a "specific" objection on that ground is made at trial and pursued on appeal. Because in **James** the defendant had objected to the standard instruction and had argued the constitutionality of the instruction, the court opined that it would be unfair to deprive him of the **Espinosa** ruling.

Defendant states that counsel moved at the penalty phase charge conference that the especially heinous and cold calculating aggravating circumstances overlap, thereby providing insufficient guidance to the jury. It appears that Defendant is attempting to argue that this issue was properly preserved. Pursuant to **James**, the objection must be specific and raised on appeal. The record indicates that no specific objection was made nor was the issue raised on appeal. Accordingly, **James** is distinguishable from the instant case and the issue is

procedurally barred. See also, **Harvey v. Dugger**, 656 So.2d 1253 (Fla. 1995).

e.) The prosecutor's improper argument during voir dire and opening and closing arguments at the guilt and penalty phases rendered Defendant's conviction and death sentence unreliable in violation of his rights under Article I, ss. 9 and 17 of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

This is also an issue which could or should have been raised on Defendant's direct appeal and is procedurally barred. See, **Roberts v. State**, 568 So.2d 1255 (Fla. 1990). Defendant did raise one issue of prosecutorial misconduct alleging a Golden Rule Violation which was raised and rejected on appeal. (Exhibit A-pg. 6). As such, this Court does not have jurisdiction to entertain this claim.

f.) Newly discovered evidence establishes that the victim may not have been abducted from the mall by force, that Wanda Robinson and John Nixon, Jr., gave separate statements to the sheriff's office that were never reported or disclosed to the defense, that John Nixon may either have had more involvement in the crime than known at trial or actually committed the crime, that John Nixon was a paid informant, and that the State obtained a statement allegedly made by Defendant to Detective Livings in violation of his right to counsel.

The portion of the issue concerning new evidence and **Brady** claim will be addressed later in this order. As to the statement made by Defendant to Detective Livings, this issue was already addressed by the supreme court. (Exhibit A-pg. 9). As such, this Court lacks jurisdiction to entertain this claim.

g.) Conducting penalty phase proceeding in Defendant's absence, when he relied on mental health mitigation to support a life sentence, violated his right to present a defense,

as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

Claims involving a defendant's absence from proceedings are also matters which should have been raised on direct appeal. See, **Rivera v. Dugger**, 629 So.2d 105 (Fla. 1993). Further, Defendant did raise the issue of his absence during the "guilty" phase of the trial wherein the supreme court held that it was not error to proceed with the trial in Defendant's absence. The supreme court stated that a defendant will not be forced to attend his trial if his actions or the means used to ensure his presence would prejudice him in the eyes of the jury. (Exhibit A, pgs. 6-7). It is not appropriate to use a different argument to relitigate the same issue. Accordingly, Defendant may not raise a related claim on collateral attack. See, **Turner v. Dugger**, 614 So.2d 1075 (Fla. 1992); **Medina v. State**, 573 So.2d 293 (Fla. 1990).

h.) The jury instructions at the penalty phase were unreasonably vague and confusing; as a result, the instructions created a presumption in favor of death, and the jurors' discretion was not suitably guided, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, ss. 9 and 17 of the Florida Constitution.

Once again, the propriety of jury instructions is an issue which should or could have been raised on appeal. See, **Reed v. State**, 640 So.2d 1094 (Fla. 1994). As pointed out in the State's Response, the Florida Supreme Court has consistently held that the more "traditional" argument, to the effect that the penalty phase jury instructions "shift" the burden of proof on to the defense, is not cognizable on a 3.850. See, **Card v. State**, 652 So.2d 344 (Fla. 1995); **Turner**, **supra**.

I.) Race discrimination permeates the justice system in Leon County and affected the preparation and prosecution of

this case at every stage; as a result, Defendant's conviction and death sentence violate his right to equal protection of the laws and to be free from cruel and unusual punishments, as guaranteed by Article I, ss. 2, 9, 16, 17, and 21 of the United States Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

This issue was raised and rejected by the Florida Supreme Court in **Foster v. State**, 614 So.2d 455 (Fla. 1992). Pursuant to **Foster**, Defendant is required to show that the State acted with purposeful discrimination in seeking the death penalty. The instant motion fails to do so. Accordingly, the claim is legally insufficient.

Defendant also alleges that the prosecution exercised peremptory challenges on the basis of race. This issue should have been raised on direct appeal and is therefore procedurally barred. See, **Lightbourne v. State**, 471 So.2d 27 (Fla. 1985).

j.) Defendant's sentence of death was based upon unconstitutionally obtained prior convictions and therefore violates his rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, ss. 9 and 17 of the Florida Constitution.

Defendant argues that two prior convictions which were used as an aggravating circumstance under **Johnson v. Mississippi**, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). Defendant contends that he was incompetent at the time the previous offenses were committed and as such, the convictions violate Defendant's fundamental due process.

Defendant does not allege that any of the previous convictions were overturned. Accordingly, the claim is legally insufficient. See, **Henderson v. Singletary**, 617 So.2d 313 (Fla. 1993).

k.) Defendant was denied his right to a trial before a jury of twelve impartial and mentally competent jurors, when a juror became mentally incompetent and other jurors were exposed to improper and prejudicial information during the course of the trial, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

This issue was raised on appeal but found to be procedurally barred because no objection had been made. The court further opined that even if the issue had been preserved there was insufficient evidence that the juror likely suffered from incompetence during the guilt phase to warrant further inquiry. Thus, the supreme court found no error in the trial court's failure to conduct further inquiry into the matter. (Exhibit A-pg. 8). Defendant's post conviction motion is an improper attempt to relitigate this issue. See, **Turner**, **supra**.

l.) The trial court violated Defendant's rights under the Fifth, Sixth, and Fourteenth Amendments by failing to instruct the jury not to consider the fact that Defendant did not testify, in the absence of a valid waiver by Defendant of his right to that instruction.

This is also an issue which should have been raised on appeal. See, **McCrae v. State**, 437 So.2d 1388 (Fla. 1983); **State v. Johnson**, 651 So.2d 145 (Fla. 2d DCA 1995). In the alternative, if Defendant is alleging that counsel was ineffective in waiving the no-inference instruction that issue will be addressed under the ineffective assistance of counsel claims.

m.) The cumulative impact of judicial error deprived Defendant of his right to a fair trial in violation of the fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, ss. 9, 16, and 17 of the Florida Constitution.

Once again, this issue could or should have been raised on appeal and is procedurally barred.

2.) Defendant raises various claims of ineffective assistance of counsel. The Court will first address the ineffective assistance of counsel claims pursuant to the standard enunciated in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To succeed on a claim of ineffective assistance of counsel under **Strickland**, Defendant must show that but for counsel's unprofessional errors, the result of the proceedings would have been different. To be entitled to an evidentiary hearing to make such showing, the Defendant must allege specific facts which are not conclusively rebutted by the record which demonstrate a deficiency in performance that prejudices the defendant. Defendant fails to sustain this burden. The alleged deficiency in performance by Nixon's trial counsel did not prejudice Nixon, and his allegations of deficient performance do not show such required prejudice.

Defendant alleges that counsel was ineffective in failing to recognize that his relationship with Defendant had deteriorated to the point where he could not effectively represent him; counsel was ineffective in failing to investigate Defendant's competency; counsel was ineffective at the guilty-innocence phase of Defendant's trial; and counsel was ineffective at the penalty phase of Defendant's trial.

The court record demonstrates that the State presented overwhelming evidence against Defendant at trial. The State introduced Defendant's confession to the police wherein he provided specific details regarding the murder which were corroborated by the evidence introduced at trial. (Exhibit B. pg. 608). In his confession, Defendant stated that he met the victim at the Governor's Square Mall and asked her for a ride. He further stated that he hit the victim in the face, put her in the trunk of the car, tied her to two trees with her jumper cables, and threw burning melting material onto her head and face.

Defendant also stated that he left the victim burning, took her car, later burned the car, threw the gas cap into a ditch and threw the car keys into a garbage can. (Exhibit C).

Witness Jeff Atteberry testified that he saw the victim speaking with Defendant at the Governor's Square Mall parking lot and hand him jumper cables. (Exhibit B, pgs. 1858-1866). Dr. Ben Turner, an expert witness in pathology, testified that the victim died by fire. (Exhibit B, pg. 1952). The victim's car was found burned and the gas cap was located where Defendant had specified. (Exhibit B, pgs. 2015-2016). Witness Carroll Hurdle retrieved the victim's car keys from a garbage can where Defendant had said that he had thrown them. (Exhibit B, pgs. 2017-2024).

The State also presented evidence that Defendant admitted killing the victim to John Nixon (Exhibit B, pgs. 2054-2063); Wanda Robinson (Exhibit B, pgs. 2064-2070), James Nixon (Exhibit B, pgs. 1966-1971), Thomas Ingles (Exhibit B, pgs. 1972-1975); and Evelyn Harris (Exhibit B, pgs. 1980-1985). These same witnesses saw the Defendant driving the victim's car on the day of the murder, the day after her murder and two days after her murder. Greg and Susan Cleary testified that they saw Defendant driving the victim's car near the murder scene about the time the murder was committed. (Exhibit B, pgs. 1876-1884, 2089). Additional witnesses testified that they had seen Defendant driving the victim's car. (Exhibit B, pgs. 561-563, 2075-2079).

Expert witness Karen Cooper and Douglas Barrow identified the Defendant's hand prints on the victim's car. (Exhibit B, pgs. 2030-2036, 2039-2051). James Turvaville testified that Defendant attempted to sell the victim's car to him. (Exhibit B, pgs. 561-563). The Defendant pawned the victim's jewelry. The pawn shop owner, Dennis Counsil [sic], identified the Defendant as being the person who pawned the jewelry. (Exhibit B, pages 2070-2073).

On August 30, 1989, the trial court conducted a post conviction evidentiary hearing wherein the State provided additional evidence that it would have presented at trial but elected not to do so since Defendant had admitted guilt. Specifically, the State choose [sic] not call other [sic] another law enforcement officer whom Defendant had confessed to, another witness named Virginia Meeks who would have testified that she saw Defendant in the victim's car and that Defendant showed her rings belonging to the victim, another witness named Judith Hill who would have also testified that she had seen Defendant in the victim's car. (Exhibit D, pgs. 77-82). At this hearing, expert Larry Simpson also testified that if any deficiency had occurred it had no effect whatsoever on the outcome of this case and that the State's case was proven beyond all doubt. (Exhibit D, pgs. 93-96).

The court record reveals that the trial court itself concluded that the trial tactic employed by trial counsel was an excellent analysis of the reality of the case and the preservation of the credibility of any mitigating circumstances that could have been placed before the jury and before the court as to disposition. It was the trial court's opinion that in view of the evidence presented in the case, the jury found the Defendant guilty by the establishment of evidence beyond and to the exclusion of any reasonable doubt. The evidence, preparation of the case and presentation, would have persuaded any jury not only beyond a reasonable doubt, but beyond all doubt. (Exhibit B, pgs. 1048-1049). From an examination of the record, it is the opinion and judgment of this Court that the trial court's conclusions were sound and well-founded.

As to the allegations regarding the penalty stage, the Defendant must show that but for counsel's errors he would probably have received a life sentence. See, **Hildwin v. Dugger**, 654 So.2d 107 (Fla. 1995); **Bertolotti v. State**, 534 So.2d 386 (Fla. 1988). The court record indicates that counsel argued for jury instruction favorable to his client. (Exhibit B, pgs. 726-

732). Defense counsel also introduced fifty exhibits in support of mitigation, (Exhibit B, pgs. 733-734), and called nine witnesses to provide mitigation testimony regarding the Defendant's background and mental and emotional problems. (Exhibit B, pgs. 764-838). Throughout the penalty phase defense counsel continually emphasized his strategic theme, which focused on Defendant's mental and emotional problems. Counsel was arguing for a life sentence. (Exhibit B, pgs. 757-758).

The record further shows that counsel objected to certain aggravating factors presented by the State. Counsel objected to aggravating circumstances testimony regarding Defendant terrorizing the victim (Exhibit B, pgs. 738-746); counsel objected that Defendant's conviction for battery on a law enforcement officer did not meet the statutory definition as a felony involving violence (Exhibit B, pgs. 868-872); counsel argued to exclude additional aggravating testimony that Defendant had tried to terrorize the victim by removing her underwear (Exhibit B, pgs. 740-743); counsel attempted to argue that the court would be impermissibly doubling aggravators by instructing the jury that it could find the Defendant's killing both heinous, atrocious and cruel and cold, calculated and premeditated (Exhibit B, pgs. 887-889); and objected against the aggravator that Defendant murdered the victim for pecuniary gain (Exhibit B, pgs. 872-883).

Trial counsel's legitimate, sufficient, and able efforts could not establish mitigating factors sufficient to overcome the aggravating factors proven by the State: (1) Defendant had prior convictions for two violent felonies, armed robbery and battery on a law enforcement officer; (2) the murder occurred in a heinous, atrocious and cruel manner; (3) Defendant murdered in a cold, calculated and premeditated manner; (4) the murder occurred during the course of a kidnapping; and (5) Defendant murdered for pecuniary gain. (Exhibit E). The Court finds that trial counsel did present substantial mitigating evidence at the

penalty phase and rendered reasonably effective assistance of counsel. Based upon the overwhelming evidence that Defendant committed an aggravated murder, Defendant cannot demonstrate that but for the alleged errors he would have received a life sentence. See, **Hildwin**, **supra**. The factual allegations of Defendant are conclusively rebutted by the record, as referenced herein, which shows that Defendant was not prejudiced by any deficiency of trial counsel.

3.) In the alternative, Defendant argues that counsel's concession of guilt without an express waiver by Defendant on the record constitutes ineffective assistance of counsel per se under **United States v. Cronic**, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Defendant claims that **Cronic** obviates the necessity of demonstrating prejudice, which is normally required for an ineffective assistance of counsel claim.

In **Cronic**, the United States Supreme Court held that when surrounding circumstances justify a presumption of ineffectiveness, a Sixth Amendment claim can be sufficient without inquiring into counsel's performance. Such circumstances arise when a defendant is denied presence of counsel at a critical stage in the prosecution, or when there is a breakdown in the adversarial process that would justify a presumption that a defendant's conviction was not reliable. **Id.** at 2046-2049. **Cronic** applies to a narrow spectrum of cases where counsel's ineffectiveness was so egregious that the defendant was in effect denied any meaningful assistance at all. See also, **Chadwick v. Green**, 740 F.2d 897 (11th Cir. 1984). Apart from circumstances of that magnitude, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. **Cronic**, **supra**, at 2047 (citing **Strickland v. Washington**, 466 U.S. at 693-696, 104 S.Ct. at 2067-2069).

As evidenced by the court record cited in the above paragraphs, this case is not one in which the surrounding circumstances justify a presumption of ineffectiveness. There is no allegation that Defendant was denied assistance of counsel in his defense. **Cronic**, **supra**, at 2044. Neither the deficiency alleged, nor the record of the trial reveal a breakdown in the adversarial process that would justify a presumption that Defendant's conviction was not sufficiently reliable to satisfy the Constitution. **Cronic**, **supra**, at 2049. Because defense counsel's concession of guilt, to try to retain sympathy during the penalty phase, is an acceptable defense strategy, Defendant is required to show prejudice. This reasoning is consistent with other courts that have applied the **Strickland** standard for ineffective assistance of counsel claims, which requires prejudice, to similar defense strategies. See, **Magill v. Dugger**, 824 F.2d 879 (11th Cir. 1987). Defense counsel's concession of guilt did not, and could not possibly have prejudiced Defendant in any way. The evidence of guilt was so overwhelming the jury would have found him guilty as charged even without such concession. For the same reasons discussed under the **Strickland**, claims, Defendant fails to show that but for counsel's errors the result of the proceeding would have been different.

4.) Defendant additionally argues that the State's failure to turn over exculpatory information in its possession before trial violated Defendant's rights under Article I, ss. 9, 16, and 17 of the Florida Constitution, Fla.R.Crim.P. 3.220, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Defendant argues that the State withheld a memorandum written by an investigator with the States Attorney's Office to an assistant state prosecutor which provided Defendant with an alibi; withheld notes contained in the State Attorney's file of pre-trial interviews which would have lent support to a defense of voluntary intoxication; and that the State failed to disclose that Defendant's brother who turned him in

was a paid information for the Leon County Sheriff's Department.

In order to establish a **Brady** violation, the Defendant must alleged specific facts which, if proven, would establish that had the evidence been disclosed a reasonable probability exists that the outcome of the proceedings would have been different. See, **Mills v. State**, 684 So.2d 801 (Fla. 1996); **Hegwood v. State**, 575 So.2d 170 (Fla. 1991). Even if proven at an evidentiary hearing, the facts allegedly constituting **Brady** material are insufficient to justify the relief sought. This alleged **Brady** material is simply insufficient to show a reasonable probability that the outcome of the trial could have been different had the evidence been presented to the jury. The evidence of Defendant's guilt was so overwhelming, the outcome of this trial would not likely have been different had the jury been provided this additional information. Confidence in the outcome of the proceedings is not undermined by the failure to disclose such evidence as alleged. See, **White v. State**, 664 So.2d 242 (Fla. 1995).

5.) Defendant further alleges that newly discovered evidence establishes that the victim may not have been abducted from the mall by force, that Wanda Robinson and John Nixon, Jr., gave separate statements to the sheriff's office that were never reported or disclosed to the defense, that John Nixon may either have had more involvement in the crime than known at trial or actually committed the crime, that John Nixon was a paid informant, and that the State obtained a statement allegedly made by Defendant to Detective Livings in violation of his right to counsel.

To qualify as newly discovered evidence, the evidence must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known the asserted facts by the use of diligence. See, **Jones v. State**, 591 So.2d 911 (Fla. 1991).

Most of the evidence cited by Defendant was available at trial. In any event, the evidence is not sufficient to show that if admitted on retrial it would probably produce an acquittal. See, **Williamson v. Dugger**, 651 So.2d 84 (Fla. 1994); **Mills**, **supra**; See also, **United States v. Reed**, 887 F.2d 1398 (11th Cir. 1989) (stating that newly discovered evidence must not be merely cumulative or impeaching). As to the statement made by Defendant to Detective Livings, this issue has already been addressed earlier in this order.

Accordingly, it is therefore

ORDERED AND ADJUDGED that the Defendant's Motion for Post Conviction Relief is hereby DENIED. Defendant has thirty (30) days from the date of this order in which to file an appeal.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 22nd day of October, 1997.

/s/
L. RALPH SMITH, JR.
Circuit Judge

copies furnished to:

All Parties
State Attorneys' Office

(Certificate of Service omitted in printing)

Joe Elton NIXON, Petitioner,

v.

Harry K. SINGLETARY, Respondent,

Joe Elton NIXON, Appellant,

v.

State of Florida, Appellee,

Nos. SC93192, SC92006

Supreme Court of Florida.

Jan. 27, 2000

Rehearing Denied June 9, 2000

After his first-degree murder, kidnapping, robbery, and arson convictions and death sentence were affirmed on direct appeal, 572 So.2d 1336, defendant sought postconviction relief. The Circuit Court, Leon County, L. Ralph Smith, Jr., J., denied motion. Defendant appealed and petitioned for writ of habeas corpus. The Supreme Court held that: (1) remand was required to permit trial court to determine whether defendant consented to trial strategy in which counsel conceded guilt, and (2) presumption of ineffective assistance arising from concession of guilt could only be overcome by showing of defendant's affirmative, explicit acceptance of that strategy.

Remanded.

Harding, C.J., concurred and filed a separate opinion in which Anstead and Pariente, JJ., concurred.

Anstead, J., concurred specially and filed a separate opinion.

Wells, J., dissented and filed a separate opinion.

Lewis, J., dissented.

Jonathan Lang, New York, New York, for Petitioner/Appellant.

Robert A. Butterworth, Attorney General, and Richard B. Martell, Chief, Capital Appeals, Tallahassee, Florida, for Respondent/Appellee.

PER CURIAM.

Joe Elton Nixon, a prisoner under sentence of death, appeals the trial court's order denying his Florida Rule of Criminal Procedure 3.850 motion for postconviction relief. Nixon also petitions this Court for a writ of habeas corpus. We have jurisdiction pursuant to article V, section 3(b)(1) and (9) of the Florida Constitution. For the reasons explained below, we remand this case to the circuit court to hold an evidentiary hearing on Nixon's ineffective assistance of counsel claim.

Nixon was convicted of first-degree murder, kidnapping, robbery, and arson. He was sentenced to death for the first-degree murder conviction. On appeal, this Court affirmed the conviction and sentences, including the death sentence. See Nixon v. State, 572 So.2d 1336 (Fla. 1990).

Nixon filed a rule 3.850 motion, which the trial court denied without an evidentiary hearing. Nixon appeals the trial court's denial of his motion for postconviction relief. He also petitions this Court for a writ of habeas corpus. Nixon raises

seven issues relating to the trial court's denial of his rule 3.850 motion.[1] He raises three issues in his petition for writ of habeas corpus.[2] We find the resolution of one issue to be dispositive in this case: whether Nixon's trial counsel was ineffective during the guilt phase of the trial.

Nixon's trial counsel made the following remarks during his opening statement in the guilt phase:

> In this case, there was be no question that Jeannie [sic] Bickner died a horrible, horrible death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt.
>
> In this case, there won't be any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise,

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[1] Nixon argues the following claims relating to the trial court's denial of his 3.850 motion: (1) the circuit court denied him a full and fair hearing on his ineffective assistance of counsel claim; (2) he was denied his rights not to be tried while mentally incompetent; (3) his death sentence must be set aside because his counsel failed to make an effective argument for sparing his life and presented evidence that was harmful to his case during the sentencing phase of the trial; (4) he was denied a competent mental health evaluation in violation of Ake v. Oklahoma, 470 U.S. 68 (1985); (5) he is entitled to prove his claims under Johnson v. Mississippi, 486 U.S. 578 (1988), that the two prior convictions used as aggravating circumstances lacked validity; (6) he should have the opportunity to prove that race discrimination tainted his conviction and death sentence; and (7) the jury weighed invalid and unconstitutionally vague aggravating circumstances in violation of James v. State, 615 So.2d 668 (Fla. 1993), and Jackson v. State, 648 So.2d 85 (Fla. 1994).

[2] Nixon presents the following claims in his habeas petition: (1) appellate counsel failed to raise on direct appeal any issue regarding Nixon's competence to stand trial; (2) appellate counsel failed to properly preserve Nixon's claims under Ake v. Oklahoma; and (3) appellate counsel failed to properly preserve Nixon's claims under James v. State, and Jackson v. State.

> that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.

Nixon, 572 So.2d at 1339. During his closing argument, Nixon's counsel said:

> Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case. In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous. I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson.

Id. Nixon argues that these comments were the equivalent of a guilty plea by his attorney. He claims that he did not give his attorney consent to enter a guilty plea or agree to allow his attorney to undertake a trial strategy in which guilt would be

admitted.[3] Nixon claims that as a result of these comments, he was denied effective representation.

On direct appeal, this Court addressed this issue and remanded the case to the trial court for an evidentiary hearing to determine whether counsel had received Nixon's consent to use this trial strategy:

> Over Nixon's objection, this Court remanded to the trial court for an evidentiary hearing to determine whether Nixon was informed of the strategy to concede guilt and seek leniency. Order of October 4, 1988, clarifying the procedure to be followed in connection with the evidentiary hearing, the defendant was allowed to present witnesses but the state was not. The state's cross-examination of Mr. Corin, Nixon's trial counsel, was limited to the scope of direct examination by the defense. Because the trial court did not interpret the order of October 4, 1988, as requiring him to make findings or conclusions, none were made. On further remand by order of February 1, 1989, the state was allowed to present witnesses. However, the state's examination of Mr. Corin was extremely limited due to his refusal to testify concerning matters not already addressed during his testimony for the defense absent Nixon's waiver of the attorney-client privilege. Nixon refused to waive the privilege and the state was unable to fully examine Mr. Corin.

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[3] Nixon voluntarily absented himself from the courtroom during his trial. Hence, he was not present when his attorney made the statements in question.

Id. at 1339-40. This Court eventually declined to rule on the matter:

> We recognize the confusion resulting from our remand for these atypical proceedings and decline to dispose of this claim on the present state of the record which we view as less than complete. Accordingly, we do so without prejudice to raise the issue in a later motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850.

Id. at 1340 (footnote omitted).

We begin our analysis by reiterating that the Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend VI.[4] The United States Supreme Court has stated that "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for its affects his ability to assert any other rights he may have." United States v. Cronic, 466 U.S. 648, 654 (1984) (quoting Walter V. Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956)).

In addition to the right to effective assistance of counsel, "the Due Process Clause [of the Fourteenth Amendment] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). The State bears the burden of making this

[4] "In Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the Court held that the Sixth Amendment right to counsel was incorporated into the due process clause [of the Fourteenth Amendment] and would apply to the states in all felony prosecutions." Vagner v. Wainwright, 398 So.2d 448, 450 (Fla. 1981).

demonstration. See Speiser v. Randall, 357 U.S. 513, 526 (1958).

The parties are in disagreement regarding the appropriate standard of review in this case. The State urges this Court to apply Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, in order to establish an ineffective assistance of counsel claim, a defendant must demonstrate (1) deficient performance by counsel and (2) prejudice to the defense. Nixon, on the other hand, argues that counsel's conduct in this case amounted to per se ineffective assistance of counsel, and that United States v. Cronic is the proper test. In Cronic, decided the same day as Strickland, "the Supreme Court created an exception to the Strickland standard for ineffective assistance of counsel and acknowledged that certain circumstances are so egregiously prejudicial that ineffective assistance of counsel will be presumed." Stano v. Dugger, 921 F.2d 1125, 1152 (11th Cir. 1991) (en banc). The Supreme Court stated:

> Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, see Michel v. Louisiana, 350 U.S. 91, 100-101 1955), the burden rests on the accused to demonstrate a constitutional violation. There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.
>
> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth

> Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in Davis v. Alaska, 415 U.S. 308 (1974), because the petitioner has been "denied the right to effective cross-examination" which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" Id., at 318 (citing Smith v. Illinois, 390 U.S. 129, 131 (1968), and Brookhart v. Janis, 384 U.S. 1, 3 (1966).

Cronic, 466 U.S. at 658-59 (emphasis added).

We emphasize that the Strickland standard normally applies to ineffective assistance of counsel claims. Cronic only applies to the narrow spectrum of cases where the defendant was completely denied effective assistance of counsel. See Chadwick v. Green, 740 F.2d 897, 900 (11th Cir. 1984).

To determine which test applies, we must first decide whether Nixon's trial counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." Cronic, 466 U.S. at 659. Trial counsel's statements during opening and closing arguments raise a question as to whether Nixon's trial counsel did, in fact, fail to subject the State's case to meaningful adversarial testing. See United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991) ("Mr. Ochoa's statements lessened the Government's burden of persuading the jury that Swanson was the perpetrator of the bank robbery[,] . . . tainted the integrity of the trial[,] . . . [and] was an abandonment of the defense of his client at a critical stage of the criminal proceedings.");[5] Osborn

[5] The Swanson court also stated:

> The circumstances presented in this matter demonstrates the constructive absence of an attorney dedicated to the protection of his client's rights under our adversarial system of justice. Once Swanson's court appointed attorney

> told the jury that there was no reasonable doubt regarding his client's identity as the perpetrator of the crime charged against him, he ceased to function as defense counsel. "An effective attorney 'must play the role of an active advocate, rather than a mere friend of the court.'" Osborn, 861 F.2d at 624 (quoting Evitts v. Lucey, 469 U.S. 387, 394, 105 S.Ct. 830, 835, 83 L.Ed.2d 821 (1985)). Instead of serving as his client's advocate during closing argument, Mr. Ochoa abandoned his client at a critical stage of the proceedings and affirmatively aided the prosecutor in her efforts to persuade the jury that there was no reasonable doubt that Swanson was the person who intimidated the victims and robbed the bank.
>
> Mr. Ochoa's abandonment of his duty of loyalty to his client by assisting the prosecutor also created a conflict of interest. In Osborn, the Tenth Circuit commented as follows:
>
> > A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest. Such an attorney, like unwanted counsel, "'represents' the defendant only through a tenuous and unacceptable legal fiction." Faretta v. California, 422 U.S. 806, 821, 95 S.Ct. 2525, 2534, 45 L.Ed.2d 562 (1975). In fact, an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition.
>
> 861 F.2d at 629.
>
> The Government has failed to identify any strategy that can justify Mr. Ochoa's betrayal of his client. "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." Cronic, 466 U.S. at 656-57 n. 19, 104 S.Ct. at 2045-46 n. 19. By arguing that no reasonable doubt existed regarding the only factual issues in dispute, Mr. Ochoa snouldered part of the Government's burden of persuasion.
>
> We cannot envision a situation more damaging to an accused than to have his own attorney tell the jury that there is no reasonable doubt that his client was the person who committed the conduct that constituted the crime charged in the indictment.

v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988) ("[A]n attorney who adopts and acts upon a belief that his client should be convicted 'fail[s] to function in any meaningful sense as the Government's adversary.'"). Therefore, if Nixon can establish that he did not consent to counsel's strategy, then we would find counsel to be ineffective per se and Cronic would control. We agree with the reasoning of Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir. 1981), where the Sixth Circuit Court of Appeals stated:

> Although statements made by attorneys in closing arguments are not evidence, nevertheless, for all practical purposes, counsel's admission of guilt on behalf of his client denied to petitioner his constitutional right to have his guilt or innocence decided by the jury. Petitioner, in pleading not guilty, was entitled to have the issue of his guilt or innocence presented to the jury as an adversarial issue. Counsel's complete concession of petitioner's guilt nullified the adversarial quality of this fundamental issue.

Under Cronic, a defendant need not show prejudice; prejudice is presumed. See 446 U.S. at 658-60. See also State v. Harbison, 337 S.E.2d 504, 507 ("[W]hen counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed."). On the other hand, if Nixon did consent to trial counsel's strategy, then it could not be said that trial counsel was ineffective, and Nixon would not be entitled to relief on this claim.

We recognize that in certain unique situations, counsel for the defense may make a tactical decision to admit guilt during the guilt phase in an effort to persuade the jury to spare the defendant's life during the penalty phase. Of course, in such cases, the dividing line between a sound defense strategy and

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943 F.2d at 1075 (emphasis added).

ineffective assistance of counsel is whether or not the client has given his or her consent to such a strategy. See Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983); Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981); Jones v. State, 877 P.2d 1052 (Nev. 1994); State v. Anaya, 592 A.2d 1142 (N.H. 1991); State v. Harbison, 337 S.E.2d 504 (N.C. 1995).

Although an attorney has the right to make tactical decisions regarding trial strategy, see Faretta v. California, 422 U.S. 806, 820 (1975), the determination to plead guilty or not guilty is a matter left completely to the defendant. See Jones v. Barnes, 463 U.S. 745, 751 (1983) ("It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal . . . ."); Brookhart v. Janis, 384 U.S. 1 (1966) (stating that although an attorney can make tactical decisions as to how to run a trial, the Due Process Clause does not permit an attorney to admit facts that amount to a guilty plea without the client's consent). At his arraignment, Nixon entered a "not guilty" plea. By pleading "not guilty," Nixon exercised his right to make a statement in open court that he intended to hold the State to strict proof beyond a reasonable doubt as to the offenses charged. See Byrd v. United States, 342 F.2d 939, 941 (D.C. Cir. 1965); Licata v. State, 81 Fla. 649, 88 So. 621, 622 (1921). "Unquestionably, the constitutional right of a criminal defendant to plead 'not guilty,' or perhaps more accurately not to plead guilty, entails the obligation of his attorney to structure the trial of the case around his client's plea." Wiley, 647 F.2d at 650.

Thus, the dispositive issue in this case is whether Nixon gave his consent to his trial counsel to concede guilt during the guilt phase of the trial. Because Nixon previously invoked the attorney-client privilege, the 1990 Court was unable to get the answer to this question. Essentially, the 1990 Court issued an invitation to Nixon to raise this issue again in his 3.850 motion. Implicit within that invitation was that the postconviction circuit

court conduct another evidentiary hearing, without the risk of the attorney-client privilege, to determine whether Nixon consented to the strategy. Despite this, the circuit court in the present postconviction motion refused to grant an evidentiary hearing, and this Court still does not have the answer that it has been seeking for the last eleven years. Therefore, we remand this case for an evidentiary hearing on this issue. Due process demands this result.

In Boykin v. Alabama, 395 U.S. 238 (1969), the Supreme Court held that a defendant may not enter a guilty plea unless that plea is intelligent and voluntary:

> A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. See Kercheval v. United States, 274 U.S. 220, 223. Admissibility of a confession must be based on a "reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant." Jackson v. Denno, 378 U.S. 368, 387. The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation. In Carnley v. Cochran, 369 U.S. 506, 516, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, than an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."
>
> We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards. Douglas v. Alabama, 380 U.S. 415, 422.

Id. at 242-43 (footnote omitted). Consequently, this Court has stated that "[d]ue process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary." Koenig v. State, 597 So.2d 256, 258 (Fla. 1992). See also Fla. R. Crim. P. 3.172.

Because counsel's comments were the functional equivalent of a guilty plea, we conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough. We also make clear that pursuant to Nixon's ineffective assistance of counsel claim, Nixon has waived the attorney-client privilege. See Reed v. State, 640 So.2d 1094, 1097 (Fla. 1994) ("Thus, it is clear that conversations between the defendant and his or her trial lawyer relevant to ineffective assistance of counsel are not protected by the attorney-client privilege."); Sec. 90.502(4)(c), Fla. Stat. (1999).

We recognize that Nixon was very disruptive and uncooperative at trial. In light of this, as well as the overwhelming evidence in this case, it has been suggested that the strategy employed by Nixon's trial counsel represented Nixon's best chance of receiving a life sentence, and, therefore, counsel should not be faulted or deemed ineffective. Indeed,

counsel's strategy may have been in Nixon's best interest. Nevertheless, the Supreme Court has made it clear that the defendant, not the attorney, is the captain of the ship. See Jones; Brookhart. Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant. The question is not whether the route taken was correct; rather, the question is whether Nixon approved of the course.

It has also been suggested that absent this strategy, Nixon's counsel had no other options. We disagree. In every criminal case, a defense attorney can, at the very least, hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt. Without Nixon's consent to do otherwise, this should have been the strategy utilized by defense counsel. If this strategy worked to Nixon's detriment, Nixon himself must bear the responsibility for that decision. Cf. Faretta, 422 U.S. at 834 ("The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. . . . And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'") (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring).

Finally, in order to avoid similar problems in the future, we hold that if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel's strategy. See Wiley, 647 F.2d at 650 ("In those areas where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with Boykin."); State v. House, 456 S.E.2d 292, 297 (N.C. 1995)

("Further, we take this opportunity to urge both the bar and the trial bench to be diligent in making a full record of a defendant's consent when a Harbison issue arises at trial."). This will ensure that the defendant has in fact intelligently and voluntarily consented to counsel's strategy of conceding guilt.

Accordingly, for the reasons stated in this opinion, we remand this case to the circuit court to hold an evidentiary hearing on the issue of whether Nixon consented to defense counsel's strategy to concede guilt. In light of our disposition of Nixon's 3.850 appeal, we do not address his habeas claims at this time.

It is so ordered.

HARDING, C.J., and SHAW, ANSTEAD and PARIENTE, JJ., concur.

HARDING, C.J., concurs with an opinion, in which ANSTEAD and PARIENTE, JJ., concur

ANSTEAD, J., specially concurs with an opinion.

WELLS, J., dissents with an opinion.

LEWIS, J., dissents.

HARDING, C.J., concurring.

"We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U.S. Const. preamble (emphasis added). As exemplified by the Preamble to this nation's Constitution, justice is the very foundation upon which our

system of government was built. Inherent within the concept of justice is the fair processing of cases. Black's Law Dictionary provides the following definition of justice:

> Proper administration of laws. In jurisprudence, the constant and perpetual disposition of legal matters or disputes to render [all persons their] due.

Black's Law Dictionary 864 (6th ed. 1990) (emphasis added) [sic]. Consequently, the term "due process of law" has developed to mean:

> A course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the enforcement and protection of private rights.

Id. at 500.

Prior to this nation's birth, the colonists were subjected to a system of government that denied individual rights and liberties and failed to provide due process. Based on their experience with the English monarchy and its courts, the founders of this country were determined to ensure that a number of individual rights and liberties were specifically provided for within the body of the Constitution. Today these rights include the right to have effective assistance of counsel in criminal matters, the right against self-incrimination, the right to an impartial jury, the right to a fair trial, the right to confront one's accusers, the right to be presumed innocent until proven guilty, and the right that the government prove a criminal matter beyond a reasonable doubt. These rights are available to all citizens, regardless of race, creed, or social status. History has shown that it is only when due process is strictly adhered to that judicial outcomes are credible. It has been said a number of times that it is more important that no innocent man be convicted than a

guilty man go free. See In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."); Furman v. Georgia, 408 U.S. 238, 367 n.158 (1972) (Marshall, J., concurring) ("[I]t is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned.") (quoting William O. Douglas, Foreword to Jerome Frank & Barbara Frank, Not Guilty 11-12 (1957)).

I share and understand the frustration of my colleagues in dissent. This is a difficult case for several reasons, not the least of which is the substantial evidence of the defendant's guilt. I do not question the competence or experience of trial counsel. Neither do I underestimate the frustration counsel must have experienced with such a disruptive and uncooperative client. Nor do I question that the strategy taken by defense counsel was an effective one reasonably calculated to help the defendant avoid the death penalty. Yet, I cannot accept that substantial evidence of guilt, a disruptive client, and an effective trial strategy can preempt the constitutional right of a defendant to the presumption of innocence and the requirement that a guilty plea be knowingly and intelligently entered. A plea of guilty cannot be entered to a judge or a jury without the defendant's consent. It is not a theoretical gloss or a hypothetical exercise to require that a defendant, no matter how gruesome or horrible his crime, how guilty he is, or how good the trial strategy, be accorded those rights. The courts have consistently required a judge to make inquiry and determine that a guilty plea is voluntarily, intelligently, and freely entered. We have developed a detailed rule setting forth specific procedures that courts must follow in making this determination. See Fla. R. Crim. P. 3.172. My research has not revealed a case where the failure to ensure that a defendant's plea of guilty was voluntary and intelligently entered was error subject to a harmless error analysis.

In the absence of certain knowledge of whether Nixon consented to counsel's strategy, the process for determining guilt

or innocence was utterly flawed in this case. If Nixon did not consent, then a number of his constitutional rights were violated: he did not have a fair trial, he did not have effective representation, he was not seen as innocent until proven guilty, and the government was not held to its burden of establishing its case beyond a reasonable doubt. Despite his difficult behavior, Nixon was still entitled to his constitutional rights. Without the benefit of these rights, we can place no credence in the jury's verdict of guilt in this case. Any other conclusion would rend the very fabric from which our justice system was woven.

Aside from the merits, this case is troublesome because of the length of time it has taken for this Court to get to this point. The trial in this case occurred in 1985, yet the trial court's ruling on the 3.850 petition was not ripe for our review until the end of 1998. However troubling this may be, the amount of time this case has taken should in no way bear upon our ultimate decision on the merits. No defendant should be denied the relief required simply because of delay.

For these reasons, I concur with the majority opinion.

ANSTEAD and PARIENTE, JJ., concur.

ANSTEAD, J., specially concurring.

I concur in Chief Justice Harding's opinion. The outcome of this case is controlled by the holding of the United States Supreme Court:

> [E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt.

Cronic, 466 U.S. at 656-57 n.19 (emphasis supplied). Obviously, a decision to "stand trial" was made here.

As to the issue concerning counsel's decision to, in essence, enter a plea of guilty without Nixon's consent, the dissent reminds us of the adage that "hard cases make bad law." When we decide cases, we must do so in accord with rules of law that apply to all cases, and therein lies one of the principle flaws in the dissenting opinion. That opinion fails to acknowledge, much less discuss, the rule of law concerning the entry of a guilty plea, and counsel's role and responsibility to her client if counsel believes that a guilty plea should be entered. Instead, it simply concludes this was a hopeless case with horrible facts; therefore, counsel should be free to do anything, including pleading the defendant guilty without the consent of the defendant.[6] As to the law, while the dissent apparently concludes that this defendant's case is hopeless, it ignores the cases to come, especially the ones that will arise if we were to adopt a rule of law that says counsel can make the decision as to a plea of guilty without the consent of the client. That is part of the "bad law" that would come from this "hard case" if we accepted the dissenting view.

The dissent also ignores the fact that the postconviction proceedings and enlargement of the record we previously mandated have never occurred. On direct appeal, we refused to deal with the competency of counsel claim because of the inadequacy of the record and with the express provision that it would be more properly resolved in a postconviction proceeding. See Nixon v. State, 572 So.2d 1336, 1340 (Fla. 1990). We know this not only because we expressly said so in Nixon, but also because we had the same issue arise in a subsequent case where we cited our holding in Nixon as one requiring an evidentiary

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[6] In fact, the procedure advocated by the dissent here would be much worse and more prejudicial than the entry of a formal plea of guilty, because at least a formal plea would have foreclosed the State from presenting, during a trial on guilt, the extensive devastating evidence of guilt alluded to by the dissent. The kind of "guilty plea" allowed here to be entered by counsel alone gave the defendant the worst of all worlds: an admission of guilt plus the devastating evidence put on by the State during a guilt phase trial that was rendered unnecessary by counsel's guilty plea.

hearing in a postconviction action. See Harvey v. Dugger, 656 So.2d 1253, 1256 (Fla. 1995). By approving the trial court's decision, we would be concluding that the same record that was declared inadequate by a unanimous court in 1990 has now become adequate to resolve this issue, and we would be overruling the holding of a unanimous court in the 1990 opinion. Further, we would be ignoring our prior explicit mandate in this very case, and ruling now, as a matter of law, that a lawyer is authorized to concede a defendant's guilt regardless of the defendant's views or input.

The record presented to us also reflects a serious issue as to Nixon's competency. Nixon's competency to stand trial first became an issue when he stood trial on an unrelated assault and battery charge five months before his murder trial.[7] At that trial, Nixon's attorney raised the issue of his client's competency. That prompted the judge to request a psychologist, Dr. Carolyn Stimel, to examine Nixon. This examination occurred during the lunch hour of the proceedings and last approximately forty-five minutes. The evaluation did not consist of any psychological testing nor was a formal competency evaluation made. Notwithstanding, the assault trial continued.

The next time that Nixon's competency was discussed was during a pretrial conference in the murder case. At this pretrial conference, the state attorney was concerned about Nixon's competency and urged an examination. There is also evidence that months before trial, Dr. Ekwall opined that Nixon's intelligence was "on the low side of normal, but its adequate." Finally, in 1993, Nixon was examined by three different mental health experts, all three of whom opined that Nixon suffers from mental retardation and may have some form of organic brain damage or organic personality disorder. Despite

[7] This assault trial involved the same counsel and was conducted before the same judge who presided over his murder trial.

these concerns, however, both parties essentially concede that no competency hearing was ever conducted.

Specifically, Dr. Henry Lee concluded that Nixon suffers from mental retardation and shows unmistakable evidence of Organic Personality Disorder. After evaluating Nixon, he found it surprising that no formal competency hearing was conducted in this case, especially given Nixon's bizarre conduct and statements prior to and during trial. He also found that in addition to the record information, the affidavits of several people, including an attorney skilled in defending the mentally ill, attest to Nixon's psychotic behavior. Dr. Denis William Keyes also concluded that Nixon is mentally retarded and suffers from evident brain damage. The psychological tests administered to Nixon place him below the lowest one percent of the population. Finally, Dr. Alec J. Whyte opined that Nixon suffers from mental retardation and an organic personality disorder. He specifically noted that the process of a criminal trial was beyond Nixon's competence to comprehend, and that his behavior during the trial is evidence of his inability to comprehend what was occurring.

All three of these opinions were based in part on Nixon's behavior before and during trial. This behavior included Nixon's refusal to leave his cell during pretrial hearings, the removal of his clothing, and his hiding under the sheets of his bed when summoned by officials. Furthermore, two months before trial, Nixon wrote an incoherent letter to his attorney that appeared to demonstrate a severe mental imbalance.

Based primarily on the above evidence and evaluations of the mental health experts, Nixon alleged in his 3.850 motion that he was not competent to stand trial. Notwithstanding, the trial court summarily denied this claim, finding it procedurally barred. However, the record does not support this conclusion. On the contrary, the record reflects that at the very least, Nixon was entitled to an evidentiary hearing on whether he was

competent to stand trial. See Peede v. State, 24 Fla.L.Weekly S391, S393 (Fla. Aug. 19, 1999); Jones v. State, 478 So.2d 346 (Fla. 1985). In fact, the State concedes that because the judge, prosecutor, and defense counsel in this case, as well as some of the experts who evaluated Nixon contemporaneously with the time of trial and who opined that a competency hearing was not necessary, are still available, a nunc pro tunc hearing could be held in this case. See Mason v. State, 489 So.2d 734 (Fla. 1986).

WELLS, J., dissenting.

I dissent.

A thorough review of the record and a plain reading of our opinion in Nixon's direct appeal leads me to the inescapable conclusion that Nixon's claim of ineffective assistance of counsel is governed by Strickland v. Washington, 466 U.S. 668 (1984). Competent, substantial evidence supports the trial court's summary denial of Nixon's claim.

I begin my analysis with reference to the facts as set forth in this Court's opinion in Nixon v. State, 572 So.2d 1336 (Fla. 1990):

> At trial, there was testimony that after church on August 12, 1984, Ms. Bickner went to a local mall to have lunch with friends. She parked her orange M.G. convertible in the mall parking lot. Ms. Bickner was later seen in the parking lot giving a black man jumper cables from the trunk of her car. Witnesses testified that on the afternoon of August 12 they saw the orange M.G. driven by a black male, later identified as Nixon, near the vicinity of the site where the body was found. Ms. Bickner's body was discovered by a couple riding through the woods who reported the incident to the police.

> The charred body was in a seated position tied around the waist with jumper cables to a pine tree. Her left arm was tied to another pine tree. Wanda Robinson, John Nixon and other witnesses testified that they saw Nixon driving Ms. Bickner's orange M.G. Robinson and John Nixon also testified that Nixon admitted killing a white woman by tying her with jumper cables and burning her. Nixon also showed them two of Ms. Bickner's rings and later said he had pawned the rings. Robinson and John Nixon also testified that on the morning of the fourteenth, Nixon told them that he was going to burn the orange M.G. There was testimony that Nixon attempted to sell the M.G. prior to burning it. A pawn shop receipt signed by Nixon for two of Ms. Bickner's rings was entered into evidence. A laboratory analyst for the Florida Department of Law Enforcement testified that Nixon's palm print was found on the trunk lid of Ms. Bickner's M.G.
>
> After his arrest, in a taped confession which was played to the jury, Nixon admitted murdering Ms. Bickner. He described how he met Ms. Bickner at the mall and asked her to take him to his uncle's house because he was having car trouble. Once on the road, Nixon hit Bickner in the face. When she stopped the car, Nixon put her in the trunk and then drove to a secluded wooded area where he took her from the trunk and tied her to a tree with jumper cables. According to Nixon, the two talked about their lives. Ms. Bickner offered to give Nixon money, to sign her car over to him, begging him not to kill her. Nixon recounted how he burned Ms. Bickner's personal belongings and then threw the top of the convertible into the fire. At some point

> after placing a paper bag over her head, Nixon threw the smoldering convertible top on Ms. Bickner, setting her on fire. He then left the scene in the M.G.

572 So.2d 1338.

I next note the following statements from the two able and experienced trial judges who were involved in this case. First, is the statement of Judge hall made at the close of the proceedings in 1985:

> One facet of the case that doubtless will come under examination is the tactics, strategy, analysis employed by defense counsel in this case.
>
> Trial court is uniquely situated in our judicial system. It's the only judicial officer that sees the people that appear, and observes their demeanor, is able to see the impact that the case has upon the jury, observe that impact, and so forth, as the jury hears it. Privy to the evidence and privy to that evidence as it is presented in the courtroom.
>
> Doubtless, there may be those who have reservations about the approach employed by trial counsel for the defense in this case.
>
> It is my view that the tactic employed by trial counsel in this case was an excellent analysis of reality of his case and the preservation of his credibility and the credibility of any mitigating circumstances that could have been placed before the jury and before this Court, as to disposition.

> It is my view, in view of the evidence in this case, the jury has found the defendant guilty by the establishment of evidence beyond and to the exclusion of any reasonable doubt. I think that the evidence, preparation of the case, presentation, would have persuaded any jury, not only beyond a reasonable doubt, but beyond all doubt.
>
> For trial counsel to have inferred that Mr. Nixon was not guilty of these offenses would have deprived him of any credibility during the penalty phase, and to some extent, although professionalism would have detracted a little bit from it, under a sentencing hearing before the Court. I think the trial counsel's approach, the maintenance of credibility, his rapport with the jury, were the only realistic steps that could have been taken, in an effort to give some relief to his client.
>
> A less experienced attorney, probably seeking to avoid criticism - either public, private or professional - would have tried the case differently, and probably would have left no hope at all for Mr. Nixon.
>
> Mr. Corin's approach, his analysis, his assessment, I think was right on the mark. I think that his approach has been conscientious and in diligent best interest to defend his client, Mr. Nixon.

Second, I note the statement of Judge Smith in ruling upon Nixon's Cronic[8] claim in the postconviction proceedings.

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[8] United States v. Cronic, 466 U.S. 648, 654 (1984).

Finally, in respect to the trial record and the direct appeal, there are three matters which are crucial to my conclusion that the majority's decision is wrong:

1. Nixon was presumed to be mentally competent to stand trial. There was no determination by the trial court that he was incompetent, and no issue was raised on appeal that the trial court erred in failing to find him incompetent to proceed.

2. Nixon was extremely uncooperative during the trial. He refused to be in court on several occasions. He took off his clothes in his holding cell to thwart the proceedings. The trial judge went to the holding cell to try to get Nixon to attend and cooperate, but Nixon continued to be uncooperative.

3. Even though Nixon was voluntarily absent from much of the trial, Nixon's trial counsel actively engaged in the trial, including conducting an extensive voir dire, objecting to photographs as unduly gruesome, and moving for a mistrial as to a portion of the State's closing in the guilt phase. In the penalty phase, Nixon's trial counsel presented the testimony of eight witnesses, including Nixon's mother and two mental health experts, a psychiatrist, and a psychologist. Nixon's trial counsel introduced substantial documentary evidence, including school, institution, and psychological reports concerning Nixon's life from 1972 to 1985.

What is plainly the reality of what we have here is a gruesome, horrible murder, confessed to by a competent but obstructive defendant who had experienced trial counsel who

proceeded on the basis of a strategy which should be recognized as obviously the only rational legal strategy to try to keep a client out of the electric chair. I cannot join the majority in replacing this plain reality with a theoretical gloss that paints what occurred as if it were some hypothetical exercise which spurned constitutional rights. I cannot accept that our courts must ignore that which reasonable, objective analysis demonstrates is patently evident.

The legal issue before us is whether Nixon's claim of ineffective assistance of counsel is governed by the oft-applied test of Strickland or by dicta in Cronic, which suggests that an attorney, in remote instances, may act so detrimentally to his client's case as to result in a breakdown of the adversarial process and will be deemed prejudicial per se. If Strickland applies, rather than Cronic, then correct legal analysis dictates that the trial judge should be affirmed, not reversed, because competent, substantial evidence supports the trial court's legal ruling that Nixon has failed to establish the requisite prejudice.

I first point out that the decision of whether Cronic applies on this record was decided by this Court in 1990, when it entertained Nixon's direct appeal. Had this Court in 1990 concluded that Cronic applied, surely it would have applied it and not wasted these last nine years. The record before this Court now stands the same as the record before it when it first considered Nixon's Cronic claim in 1990. The trial court was correct in concluding that Strickland applied, for why else would the Court have sent the case on to postconviction proceedings? What the majority actually does is grant a rehearing of the 1990 decision by this Court, and that is wrong.

I also point out that the majority's decision is based on an overly expansive interpretation of Cronic. The majority's decision as to the application of Cronic is based on cases which either do not apply or cases whose reasoning have been justifiably criticized. The majority relies on cases from the Ninth

and Tenth Circuits. See United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991), Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988). The First Circuit has rightfully rejected the expansive interpretation placed on Cronic in Swanson and Osborn. In Scarpa v. Dubois, 38 F.3d 1 (1st Cir. 1994), the First Circuit considered a case in which a lawyer argued a defense on behalf of his client which was tantamount to admitting guilt:

> As mentioned above, the district court relied primarily on dictum contained in United States v. Cronic, 466 U.S. at 658-60, 104 S.Ct. at 2046-47, for the proposition that, in the circumstances at bar, it could forgo an inquiry into actual prejudice. The Cronic Court stated that in rare instances prejudice might be presumed "without inquiry into counsel's actual performance at trial." Id. at 662, 104 S.Ct. at 2048 (dictum). But, the approach suggested in this statement is in all events the exception, not the rule - and it can been employed only if the record reveals presumptively prejudicial circumstances such as an outright denial of counsel, a denial of the right to effective cross-examination, or a complete failure to subject the prosecution's case to adversarial testing. See id. at 659, 104 S.Ct. at 2047. The Cronic Court itself warned that, in most cases, a showing of actual prejudice remained a necessary element. See id. The Court stated: "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." Id. at 659 n.26, 104 S.Ct. at 2047 n.26.
>
> For the most part, courts have been cautious in invoking the exception limned in the

Cronic dictum. Cronic-like principles have been applied, for example, in situations in which defense counsel labored under an actual conflict of interest, see Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), or in which no attorney appeared despite a defendant's unwaived right to appointed counsel, see United States v. Mateo, 950 F.2d 44, 48-50 (1st Cir. 1991), or in which defendant's lawyer sat in total silence throughout the relevant proceeding, see Tucker v. Day, 969 F.2d 155, 159 (5th Cir. 1992) (involving resentencing); Harding v. Davis, 878 F.2d 1341, 1345 (11th Cir. 1989) (holding that defense counsel's muteness throughout trial, including his utter silence as the judge directed a verdict against his client, is per se prejudicial), or in which the defense attorney was absent from the courtroom during a critical part of the trial, see Green v. Arn, 809 F.2d 1247, 1259-64 (6th Cir.), cert. granted, vacated and remanded to consider mootness, 484 U.S. 806, 108 S.Ct. 52, 98 L.Ed.2d 17 (1987); Siverson v. O'Leary, 764 F.2d 1208, 1217 (7th Cir. 1985), or, pre-Cronic, in which counsel snoozed through much of the proceedings, see Javor v. United States, 724 F.2d 831, 833 (9th Cir. 1984).

A few courts have extended the exception's boundaries beyond the circumstances surrounding representation and found that a lawyer's particular errors at trial may cause a breakdown in the adversarial system and thus justify invocation of the Cronic dictum. See Swanson, 943 F.2d at 1074 (holding that knowingly and explicitly conceding reasonable doubt in closing argument is per se prejudicial); Osborn, 861 F.2d at 628-29 (finding per se

prejudice when defense counsel intentionally stressed the brutality of his client's crime, admitted that the evidence against his client was overwhelming, and made statements to the press that his client had no evidence to support his claims). We believe that these cases misperceive the rationale underlying the Cronic expression. In our view, the Court's language in Cronic was driven by the recognition that certain types of conduct are in general so antithetic to effective assistance - for example, lawyers who leave the courtroom for long stretches of time during trial are unlikely to be stellar advocates in any matter - that a case-by-case analysis simply is not worth the cost of protracted litigation. No matter what the facts of a given case may be, this sort of conduct will almost always result in prejudice. See Cronic, 466 U.S. at 658-59, 104 S.Ct. at 2046-47. But attorney errors particular to the facts of an individual case are qualitatively different. Virtually by definition, such errors "cannot be classified according to likelihood or causing prejudice" or "defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid." Strickland, 466 U.S. at 693, 104 S.Ct. at 2067. Consequently, the Court has declined to accord presumptively prejudicial status to them. See id.

We are not alone in our attempt to harmonize Cronic with Strickland by drawing an easily visible line separating those few cases in which prejudice may be presumed from the mine-run (in which actual prejudice must be shown). When confronted by particular errors on the part of defense counsel, best evaluated in the context of the defendant's trial, other federal courts have

refused to march under the Cronic banner, and, instead, notwithstanding the seriousness of the errors, have performed both parts of the requisite Strickland analysis. Thus, in McInerney v. Puckett, 919 F.2d 350 (5th Cir. 1990), the defendant claimed that his lawyer's lack of preparedness and failure to raise an insanity defense justified the invocation of the Cronic dictum. See id at 352-53. In requiring a showing of prejudice, the Fifth Circuit noted that "bad lawyering, regardless of how bad, does not support the [per se] presumption; more is required." Id. at 353; see also United States v. Thompson, 27 F.3d 671, 676 (D.C. Cir. 1994) (finding no prejudice per se in defense counsel's failure to inform defendant before guilty plea that, as a career offender, he faced possible life imprisonment); United States v. Baldwin, 987 F.2d 1432, 1437-38 (9th Cir.) (finding no prejudice per se where attorney conceded his client's guilt at pretrial conference and neglected to request jury instruction on overt act requirement for conspiracy charge), cert. denied, 508 U.S. 967, 113 S.Ct. 2948, 124 L.Ed.2d 696 (1933); Woodard v. Collins, 898 F.2d 1027, 1028 (5th Cir. 1990) (requiring showing of prejudice where defense counsel advised the accused to plead guilty to a charge that counsel had not investigated); United States v. Reiter, 897 F.2d 639, 644-45 (2nd Cir.) (applying full Strickland standard in spite of defendant's claim that counsel's errors were so pervasive as to amount to "no counsel at all"), cert. denied, 498 U.S. 990, 111 S.Ct. 533, 112 L.Ed.2d 543 (1990); Green v. Lynaugh, 868 F.2d 176, 177-78 (5th Cir.) (applying full Strickland analysis to attorney's decision to conduct "almost no investigation"),

cert. denied, 493 U.S. 831, 110 S.Ct. 102, 107 L.Ed.2d 66 (1989); Henderson v. Thieret, 859 F.2d 493, 499 (7th Cir. 1988) (applying second prong of Strickland to attorney's lack of preparation in connection with sentencing), cert. denied, 490 U.S. 1009, 109 S.Ct. 1648, 104 L.Ed.2d 163 (1989); Gardner v. Ponte, 817 F.2d 183, 186-87 (1st Cir.) (refusing to extend Cronic to attorney's failure to object to jury instructions), cert. denied, 484 U.S. 863, 108 S.Ct. 181, 98 L.Ed.2d 134 (1987); State v. Savage, 120 N.J. 594, 577 A.2d 455, 466 (1990) (finding no prejudice per se in a capital case where counsel only met once with defendant). Similarly, in reviewing claims of ineffective assistance of counsel at the appellate level, courts have declined to apply Cronic to attorney errors that do not amount to the constructive absence of counsel. See, e.g., Hollenback v. United States, 987 F.2d 1272, 1276 & n.1 (7th Cir. 1993) (finding no per se prejudice in appellate counsel's citation to wrong provision of money-laundering statute); United States v. Birtle, 792 F.2d 846, 847-48 (9th Cir. 1986) (finding no per se prejudice when defendant's appellate counsel failed to appear at oral argument or file a reply brief).

> These authorities suggest that attorney error, even when egregious, will almost always require analysis under Strickland's prejudice prong. We agree. Thus, we decline to adopt the expanded version of Cronic embraced by the district court. Our reasons are manifold, but four of them are paramount.

38 F.3d at 11-14 (footnotes omitted) (emphasis added).

The Fifth Circuit has also been critical of the Ninth Circuit with regard to that court's interpretation of Cronic. In Childress v. Johnson, 103 F.2d 1221 (5th Cir. 1997), the court held:

> While gleaning insight from Swanson's statement of Sixth Amendment principles, we do not necessarily endorse its finding of a constructive denial of counsel. Defense counsel in Swanson failed to call witnesses and conceded in his closing argument that the evidence of his client's guilt was overwhelming. These appear to be trial errors amenable to Strickland analysis. See Scarpa v. Dubois, 38 F.2d 1, 12 (1st Cir. 1994) (criticizing Swanson), cert. denied, ___ U.S. ___, 115 S.Ct. 940, 130 L.Ed.2d 885 (1995).

103 F.3d 1229 n.12 (emphasis added). In Vines v. United States, 28 F.3d 1123 (11th Cir. 1994), the Eleventh Circuit stated:

> "Cronic's presumption of prejudice applies to only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all." Chadwick v. Green, 740 F.2d 897, 901 (11th Cir. 1984).

Id. at 1128 n.8.

No fair reading of the instant record can lead to the conclusion tha. Nixon was "denied any meaningful assistance at all." Id. This case must be analyzed in light of Florida's death penalty procedure. Counsel's performance must necessarily consider both the guilt and penalty phases. The trial record demonstrates that counsel made a rational choice, one that a competent, experienced lawyer would be expected to make given

the evidence, which was to call no witnesses and emphasize the penalty phase. This was appropriately stated by Judge Hall in 1985, and this Court is wrong to ignore it in 1999.

I also dissent because I believe the majority's opinion, after more than nine years, creates a new standard for this case. The majority opinion states at page 14 (slip opinion): "[W]e conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough." Is this to be "established" by a preponderance of the evidence - clear and convincing evidence - or to the exclusion of every reasonable doubt? Is a nod of the head sufficient, or does the majority actually require a Boykin[9] on-the-record acceptance to have been made? It appears to me that the majority is here dictating a new trial, only leaving to the trial judge the actual ordering of it.

This appears to me to dictate a new trial because the record has been clear for the fifteen years since this trial that during the trial Nixon set about not to "explicitly accept" anything. This was part and parcel of his disruptive and noncooperative conduct. If "explicit acceptance" per Boykin is the requirement, this Court should have so stated in 1990. If that had been correctly the issue then, this Court's majority at that time would have reversed for a new trial based on the record, which does not have a Boykin on-the-record "explicit acceptance." However, the then unanimous majority did not do that. The present new majority confuses our procedure when it in actuality rehears and sets aside that decision. I conclude that it is harmful to the processing of capital cases generally when the majority of this Court erodes the distinction between direct appeal and postconviction relief for a particular case, as is being done here.

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[9] Boykin v. Alabama, 395 U.S. 238 (1969).

Finally, I believe this case again exemplifies why this Court must have a much better and more pro-active case management procedure in capital cases. If, as the majority now holds, the record had to contain "specific testimony," there is no justifiable explanation as to why it has taken a decade to determine whether that testimony exists or to require a new trial. Since I have been on this Court, I have repeatedly advocated that this Court actively case-manage these cases following the direct appeal. This case plainly demonstrates the past-due need for this Court to implement procedures for quarterly case management conferences in the trial courts with status reports reviewed each quarter by this Court and direction through the Chief Justice to the Chief Judge or each circuit in respect to cases in which appropriate progress in the adjudication of postconviction issues is not being made.

[Volume III, Record on Appeal, Case No. SC01-2486]

[387] IN THE CIRCUIT COURT OF
THE SECOND JUDICIAL CIRCUIT IN
AND FOR LEON COUNTY, FLORIDA

CASE NO.: 84-2324

STATE OF FLORIDA,

vs.

JOE ELTON NIXON,

Defendant.
_____/

PROCEEDINGS: EVIDENTIARY HEARING

BEFORE: HONORABLE JANET E. FERRIS

DATE: Friday, May 11, 2001

LOCATION: Leon County Courthouse
Tallahassee, Florida

REPORTED BY: SONIA FANCHER, RPR
Notary Public in and for the
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THE COURT: Gentlemen, if we could just take care of a few preliminary matters before we start, are you ready? We are a little bit early.

MR. EVANS: Mr. Corin has not made it down. He has court this morning at 8:30. So it will be a few minutes before he arrives.

MR. LANG: We have some preliminary issues also.

THE COURT: All right. Good. Let me just make sure that we are very clear on exactly what issues we are here to resolve today.

Now, my understanding is that the motion that was before Judge Smith is this motion; is that correct?

MR. FREEDMAN: That's correct, Your Honor.

THE COURT: And what I am holding up and showing to counsel is a document that is in the court file entitled Motion to Vacate Judgment of Conviction and Sentence and Consolidated Request That Leave to Amend Be Allowed. This was filed October 7th of 1993.

So this was the motion that was before Judge Smith prior to the, I guess, appeal of the motion to the Supreme Court which brings us back to – well, I guess, there were some intervening orders.

MR. EVANS: I am not aware of there being any [390] additions or changes to that particular motion.

MR. LANG: That particular motion is as filed as long as it is the one that says corrected copy. I don't know whether it does. I'm almost certain Your Honor has the right copy.

MR. EVANS: It was on one of the pages. I don't remember which page, if it was the cover sheet or one of the sheets, there was listed corrected copy. I do recall seeing that.

THE COURT: All right. I'm not sure if this one is corrected or not.

MR. EVANS: We may need to take a look at it.

THE COURT: Sure. Now, we have – let me back up a little bit too if I could. And I should for the record indicate that Mr. Nixon is present in the courtroom

And, gentlemen, if you would, each go and identify yourself for the record so everyone will be clear on who is here. Mr. Lang?

MR. LANG: Jonathan Lang from New York, New York, attorney for the defendant, Mr. Joe Elton Nixon.

MR. FREEDMAN: Eric Freedman of the New York Bar for Mr. Nixon.

THE COURT: Thank you.

[391] MR. EVANS: Eddie Evans from the State Attorney's Office.

MR. MARKY: Raymond Marky, assistant state attorney for the State.

THE COURT: Thank you, Mr. Marky.

MR. MARKY: Can you understand me okay?

THE COURT: Yes, thank you.

MR. FRENCH: Curtis French, assistant attorney general for the State also.

MR. GUARISCO: Tony Guarisco, assistant state attorney for the State.

THE COURT: Very good. I just want to make sure the record will reflect who was present here today.

MR. EVANS: Your Honor, this does not appear to be the corrected copy. When did you file the corrected copy?

THE COURT: I think there is another one in the file. We will check and see if that's the correct –

MR. EVANS: This one looks like it was filed October 7th, 1993, and I think the corrected copy was filed –

MR. LANG: Shortly thereafter, Your Honor, I believe it was filed under a deadline, and then there were some typographical errors that were corrected.

THE COURT: Is that all that was corrected [392] though, Mr. Lang, or were there any substantive corrections?

MR. LANG: Your Honor, frankly I can't remember that there were. I don't believe there were. The certificate of service on the corrected copy is the 14th of October, 1993.

THE COURT: For the record, I do now have before the corrected copy of the identical motion that I just read into the record. So I do have that.

Now, gentlemen, I have thoroughly read the Supreme Court's order. And this is the opinion in Nixon versus Singletary, 758 So.2d 618. And I'm also very familiar with Judge Smith's order and, although it's a bit confusing, the historical procedural status of the case and the, I guess, remands that had occurred between the Supreme Court and the Circuit Court here.

Now, my understanding from the Supreme Court's opinion is that we are here to determine one issue and one issue only. Is that correct, gentlemen?

MR. LANG: That's right.

THE COURT: All right. And that issue is, essentially, that Mr. Nixon did not give – or his claim is that he did not give his attorney consent to, as the Supreme Court has framed it, enter a [393] guilty plea or to agree to allow his attorney to undertake a trial strategy in which guilt would be determined. And this, obviously, pertains to the ineffective assistance of counsel claim that was raised in this motion.

Now, I am not in the least bit clear on the resolution of the other issues. I am assuming the Supreme Court found the trial court's order adequate in regard to the other claims. Well, Mr. Freedman is shaking his head. I don't know that.

But all I can tell you from my understanding of the opinion itself is that this case has been presented back to the trial court for an evidentiary hearing on that one ineffective assistance claim as it relates to the issue that I've just described.

Is that your understanding, Mr. Lang?

MR. LANG: Your Honor, yes, we agree with half of what you said. With respect to the unresolved issues, it is our view that they are held in abeyance.

But the resolution of that here is not necessary because you're absolutely correct, the issue is whether or not he affirmatively agreed to the concession of guilt.

THE COURT: Okay.

[394] MR. MARKY: Excuse me. May I be heard?

THE COURT: Absolutely.

MR. MARKY: Your Honor, following the Florida Supreme Court's decision, the State of Florida sought certiorari review in the United States Supreme Court contesting the legal decision of the Florida Supreme Court.

Counsel filed a reply in which he took the position that it was all premature, the issues that we were presenting were premature because all the Florida Supreme Court did was remand it for an evidentiary hearing.

Now, we believe that because it's been remanded to decide the issues we have a right to preserve the record in the event the Florida Supreme Court – should, Your Honor, rule against the State, the State will appeal.

We believe that we have a right to have a fully developed record on the ineffectiveness claim which would necessarily go beyond the simple question of did he consent or didn't he consent because subsequent to the Florida Supreme Court's decision the Supreme Court of Washington in an en banc decision – the cite is 16 Pacific Third, page 1. And the case is, In the Matter of Stinson. That's [395] how they style it.

The court in an en banc decision which was identical to this case – in fact, in Stinson the defendant was protesting the defendant's strategy. The court rejected the claim on the basis of Strickland versus Washington.

Now, where I am getting, Your Honor, is the Florida Supreme Court has decided a federal question in a fashion contrary to the decision of that same federal question by another State Supreme Court.

The Florida Supreme Court didn't have the benefit of that. We fully intend to pursue this all the way again to determine whether we get a hearing on our issue. So we would expect since we've never had the hearing that the State sought – not in '88, not '92, we've never been able to get an examination of all the facts and circumstances which, of course, the United States Supreme Court would want developed as a position counsel took.

And, incidentally, I'm going to provide the Court with a copy of the reply to the petition for cert filed by Mr. Lang so that the Court has a full record. And we would, therefore, expect latitude on the competency of counsel particularly with respect to our examination of Mr. Corin. And that's our [396] position, Your Honor.

THE COURT: All right. Let me ask you this, Mr. Marky. What issues other than the one issue that has been framed by the Supreme Court would the State propose then to seek to create a record for?

MR. MARKY: Just what Mr. Corin did during the representation of Mr. Nixon, his trial preparation, discussions he had with him, we're not going off into the other issues –

THE COURT: Okay.

MR. MARKY: – other than competency of counsel as it might relate to his statement in court. And let me just say offhand, Mr. Corin did not plead him guilty. Mr. Corin in opening statement said he believed the State would be able to prove beyond a reasonable doubt the charge. But we want that

reviewed in a record properly developed so we can preserve our legal issue.

THE COURT: All right. If I could then – Mr. Freedman, hang on one second because what I want to do – I want to give you, obviously, a chance to make opening statements about this. I just want to make sure we have properly framed the issue before we start.

Now, Mr. Marky, I had on my own fully intended [397] to try to create as complete a record as possible and assuming that the issues would be fully developed in regard to Mr. Corin's representation of Mr. Nixon, conversations that occurred in regard to that representation, and development of the trial strategy which, certainly, is the pivotal issue. And then, of course, Mr. Nixon's statements also in regard to Mr. Corin pursuing that strategy or any other form of communication that occurred regarding the trial strategy.

What I was concerned about though is there were numerous other issues that Judge Smith addressed for example, competency – Mr. Nixon's competency to proceed. And it, certainly, appears that Judge Smith presented the legal arguments in regard to those particular issues, and I just did not or was not able to glean from the Supreme Court's opinion exactly how they were disposing of those.

But I did not intend to go into and I don't imagine that you-all intended to go into issues of the competency, the new evidence, those things that were raised at least in the motions but nonetheless to fully explore the issue of ineffective assistance of counsel in whatever form.

And I'm perfectly willing to allow the hearing [398] to proceed on those terms because my understanding is that although the issue is pretty much narrowed by the Supreme Court's opinion, I think in terms of developing a record it would

be appropriate to inquire maybe a little beyond the bounds of that specific issue of agreement. Now, Mr. Freedman?

MR. FREEDMAN: Your Honor, we, of course, agree that those claims on other subjects entirely aren't before you. But, furthermore, it's been remanded for one very narrow factual question relating to our claim on the Cronic case which holds that under certain circumstances you have no lawyer at all and need not meet a bunch of other requirements. And the Supreme Court said that if we managed to show no affirmative consent we have come within that case and are entitled to reversal without more.

Now, we, who also have in that 3.850 motion a Strickland claim which requires under Supreme Court law proving a bunch of additional things, have demanded and been denied a hearing on that. Counsel now proposes to get around the ruling of the Supreme Court that we win on Cronic and are entitled to a remand to see if we can prevail on that, holding all other issues in abeyance, and proposes to make a, quote, full record on, quote, competency of counsel.

[399] Then he's proposing to evade what the Supreme Court ruled, and then at some later time to be able to say, well, Mr. Nixon had a full chance to litigate everything about competency of counsel, and that's all wrong.

If we were going to have a full hearing about competency of counsel, which after all we are attacking, then we would put on evidence in support of all the claims in that petition. But that is nowhere where we are.

The petition as a whole is in the Supreme Court. Only this little piece about did he affirmatively consent is here. And of course matters that, you know, relate to that are appropriate; but any suggestion that this is an inquiry into competency of counsel generally we object to vigorously.

THE COURT: All right. Hang on, Mr. Marky. Tell me what ineffectiveness claims you decline to address or you would argue should not be addressed.

MR. LANG: Your Honor, as Mr. Freedman said, there are ineffective claims under Cronic which are, basically, per se ineffective assistance claims. There are guilt phase ineffective assistance claims under Strickland which would, of course, require the [400] two-prong showing of inadequacy and prejudice.

Those are definitely not part of this proceeding, and our concern is that what the State is trying to do is to try to overrule the Florida Supreme Court's decision. They said that the Cronic issue for them right now is the dispositive issue. I mean, they said it three times.

And then we also have Strickland penalty phase claims, inadequate investigation, failure to put on the proper witnesses, inadequate preparation of the expert witnesses, which also, of course, under Strickland would require both a showing of inadequacy and prejudice.

Now, if we are going to have a hearing on that, Your Honor first of all we ought to have had notice of that. And second of all, one day would never do it. If we knew that that was the case, we would have asked Your Honor for much more time. This is a total surprise to use that the State wants to inquire into this stuff.

MR. MARKY: Your Honor, perhaps I should complete the record. This is our petition in the United States Supreme Court wherein if you will look at the issue presented, we clearly tendered to the United States Supreme Court whether Cronic applied or [401] whether Strickland applied.

Now, I understand the Supreme Court answered that, and you're bound by it. But the United States Supreme Court is not. Now, we took the position in the United States Supreme Court that a hearing wasn't necessary to resolve that legal issue.

They filed the response I gave you and said it is premature, all he ordered was a hearing. It is disingenuous for counsel to say, well, gee, they need an evidentiary hearing on the issue. And then when we try to develop the facts which the Supreme Court of Washington looked to, they say, oh, well, you can't develop that.

We only have got one question. Your Honor, it will only take five minutes to answer the question supposedly that they want to limit you to. And I submit the State will be denied its legal right to develop a correct record.

MR. FREEDMAN: With respect, Your Honor, there is no inconsistency. And if anybody is going to be denied their legal right if you proceed according to their plan, it will be our denial of a legal right to develop a full evidentiary hearing on our Strickland claim.

No, Your Honor, we said, quite appropriately, [402] that to figure out whether Cronic applied or Strickland applied was all premature at this point because the facts with respect to whether or not there was any affirmative consent had not been developed.

If it turns out there was affirmative consent, the whole case is moot anyway. If it turns out that there wasn't any, then he can take his cert issue, and it will follow as it follows. But that was the factual issue to be determined.

And exactly what we wrote in the cert petition was the Florida Supreme Court has sent it down to decide whether there

was affirmative consent. You, the United States Supreme Court, shouldn't mess with this until that time.

And that was our position then, and that's our position now. And that's what the hearing is about as far as we are concerned. And as Mr. Lang said, we feel strongly that it would be plain error to expand it beyond the particular bounds of what's been remanded.

And if, indeed, it will take five minutes to decide that, that's great. We will be out of here in five minutes.

THE COURT: Well, what I am going to do at this [403] point, gentlemen, is to begin with the issue specifically articulated by the Florida Supreme Court. And as soon as we have pretty much covered that issue, then, Mr. Marky, we will proceed to see what exactly it is that the State would like to include in the record or to elaborate which issues because what I would like to do is try to confine this to the motion as it was filed by the defendant and to proceed from there because we're talking rather generally about ineffective assistance claims.

And, obviously, you understand, Counsel, that my concern is that this case has been piecemealed so many times. And the Supreme Court appeared – Florida Supreme Court appeared to express great frustration over the length of time that it took to get here.

I am more than willing to provide as much time as is necessary to develop whatever issues need to be developed. But what you seem to be telling me is we are going to do this one, which has taken considerable effort to get to, one very small issue; and then we are going to start doing the other issues.

Now, I don't know because I, unfortunately, just [404] cannot tell from the Supreme Court's opinion if they intended to agree with Judge Smith that the denial without a hearing was

appropriate in regard to those other claims. I just can't tell. And the habeas corpus they have certainly put to the side at least temporarily.

MR. FREEDMAN: Your Honor, this is a case, I'm afraid, of make haste slowly. What we are sparring about in the big picture is federal habeas corpus. What's predictably going to happen if you accede to their proposal is that when in federal habeas corpus we want to press the Strickland claims, assuming that they are eventually denied by the Florida Supreme Court – it is our view, considering the first footnote in that opinion, that they have held everything except the Cronic claim.

But assuming that our Strickland claims are eventually denied by the Florida Supreme Court, when we reassert them in federal habeas corpus, it's a certainty that the State will respond, ah-ha, you had the opportunity to develop those in an evidentiary hearing in Florida State Court, and you didn't. And now you're foreclosed from developing them.

Therefore, if you intend to get into Strickland, we are going to have to respectfully insist exactly [405] on what Mr. Lang said which is then we want the right to put on our Strickland case and/or – or have you deny us that right so we can tell the Federal Court there is no mystery about it, so we can tell the Federal Court that we did not have the opportunity to present our Strickland case.

What we don't want is for the State both to be able to evade what the Florida Supreme Court said, which is we don't need to talk about Strickland, we are only talking about Cronic – if we get this fact issue resolved, the whole case may go away on Cronic – and also to get the benefits of saying, well, there is a full hearing on everything, why didn't you put on your case under circumstances where, of course, we didn't have the slightest notice to do any such thing.

MR. MARKY: One more. Your Honor, I am not talking about whether you would consider it ineffective in his failure to present a competency defense or anything like that. I am talking about, develop what Mr. Corin did leading up to the decision that he came to to [sic] not litigate the guilt issue and the facts and circumstances surrounding that decision.

Because, otherwise, I am going to get up there, [406] and I'm not going to have any evidence to present that the issue was to be decided under a Strickland prejudice test rather than Cronic.

THE COURT: Certainly.

MR. MARKY: And I'm not asking you to overrule the Supreme Court. And I believe the Court fully well knows I wouldn't do that. But we would have a right to –

THE COURT: I'm not sure about that, Mr. Marky.

MR. FREEDMAN: With all respect, that is what he is trying to do. That is exactly what they ruled.

THE COURT: Well, no, let me –

MR. MARKY: Excuse me?

THE COURT: Hang on, Mr. Marky. What I am – and perhaps we are making a little mountain out of a mole hill here. What I am hearing from Mr. Marky is perhaps some latitude in development of the record on this claim as I've articulated.

And I, certainly, will provide the State with that opportunity. I want to fully provide – or to provide a full record and as complete as possible in regard to everything having to do with development of the trial strategy and the discussions that occurred there between Mr. Corin and Mr. Nixon.

MR. MARKY: May I just add one thing?

[407] THE COURT: All right.

MR. MARKY: Of course, counsel perhaps overlooked we have a right to proffer evidence –

THE COURT: Sure.

MR. MARKY: – that the Court wishes to exclude.

THE COURT: Okay.

MR. MARKY: And I'm not trying to do what they are suggesting I am.

THE COURT: Well, I think we are now having a meeting of the minds. Because, certainly, Mr. Marky, if, for example, on the issue of competence or whether trial counsel understood that Mr. Nixon was not competent when the trial – whatever.

I doubt that Mr. Lang and Mr. Freedman are prepared with whatever witnesses they might need for that. But in this general issue, in the complete issue of trial counsel's preparation and strategy, I have no inclination at all to limit the testimony one way or the other.

So, I mean, in other words within obvious reasonable bounds I certainly intend to develop a full record there. So I think we are all in agreement at this point, and I think we are safe to proceed.

MR. FREEDMAN: Your Honor, if we could, before [408] we lose it, we also have these couple of preliminary matters.

THE COURT: Okay.

MR. LANG: Looking around the courtroom are we sure that basically it is just court staff in here? Otherwise, we would approach the Bench.

MR. EVANS: Well, we have a lot of people from our office, the Public Defender's Office, and the reporter who was here has left.

THE COURT: Are we looking for witnesses, Mr. Lang?

MR. FREEDMAN: If the reporter is walking in and out of the room –

MR. EVANS: The reporter is not in here.

MR. FREEDMAN: Well, I don't know if he will suddenly walk in in five minutes.

MR. LANG: Maybe we should approach the Bench. This is going to be short.

THE COURT: Well, gentlemen, I am a little reluctant to –

MR. FREEDMAN: We can bring the court reporter, and we can bring the defendant.

MR. EVANS: Well, Judge – just give an overview of what you want to discuss with her.

MR. LANG: We can address it quickly. First of [409] all, since Mr. Freedman here has been making legal argument, we would like to present you with an order admitting him pro hac vice so that if he does anything bad, at least he is under your jurisdiction.

MR. MARKY: No objection.

THE COURT: Thank you. We should attend to these housekeeping matters.

MR. LANG: But then we have two substantive issues, Your Honor, that we want the Court to be aware of. The first is, obviously, Your Honor is aware that documents from the attorney's file have been produced here. But they are produced under seal.

We have a stipulation with the State cooperating with us that they will be limited only to use by Mr. Marky, Mr. Evans, and the immediate staff that are using it. And they will go back to the court file under seal.

We would like the Court and the State to be mindful when referring to attorney/client documents that they not be – that they be shown to the witnesses, but that they not be –

MR. MARKY: Your Honor.

MR. LANG: – published, if you will, to the outside world because if the ultimate result of this [410] turns out to be a new trial that, obviously, could have devastating constitutional consequences.

MR. MARKY: Your Honor, if I might be heard on that. Counsel is concerned about media. While Florida has come in the sunshine and we don't have hearings where evidence is not presented and, the way things look, any retrial will be many years away should one ever be held, there has been a waiver of the attorney/client privilege by the invocation of an ineffective assistance of counsel claim. And there is no basis for this motion.

We oppose to it without – and if the Court please, it would have to submit notice to the media and give the media an opportunity to be heard.

THE COURT: Well, let me do this, gentlemen. Now, Mr. Lang, my concern when I issued the order was that if the defense wished to have that order reviewed, my understanding of the Supreme Court's position on this is that they will entertain a certiorari petition to do so.

And that was why I inquired and gave you an opportunity to seek review if you had decided that was appropriate. I mean, I greatly appreciate the fact that we are able to proceed here with the hearing and that review was not sought because I [411] fully expected that it would delay the hearing.

MR. LANG: Well, Your Honor, I guess – I'm sorry.

THE COURT: Let me do this. If there are specific matters that the defense feels are highly – I won't use the term prejudicial. If you are expressing some serious concern over a particular statement contained in those documents, we may have a Bench conference regarding that.

But my feeling is because I have disclosed those records to the prosecution at this point and in light of the Supreme Court's position on the attorney/client privilege – and I know the defense certainly took a slightly different view of those records. And I, of course, ruled accordingly.

But I believe they should be discussed to the extent that they need to be discussed. And I don't know if the State needs to discuss them or you need to discuss them. But I don't see any way to prevent that from being publicly disclosed.

And I understand the legal difficulty that may place you in in [sic] terms of any further argument about them. But I just

encourage you to place any objections you need to on the record or any further discussions about those records as we need to go [412] along.

But generally, I would deny your request to keep those matters private because I do believe they have been disclosed at this point. And, again, there is a huge body of documentation, a large number of records that were revealed that I have agreed to seal into the Court file because there may be none used here today in which case it would be, obviously, the best practice so that the Supreme Court can review that.

I don't know what documents you-all may need from that large number of records that were at issue. So let's see where we are with that because there may be no records of great relevance. In regard to my concerns about Mr. Corin's handwriting, there may not have been much that was of any great revelation in those records.

Let's wait until we get to those points, but generally I want the record to be clear that my understanding would be that by making them available to the State we can't then prohibit public disclosure of those records unless there is some overriding need to. And I would be willing to address that at the appropriate time.

MR. LANG: Well, Your Honor, I guess it falls in the category of our disinclination to appeal so that [413] we can move this along may fall in the category of no good deed goes unpunished.

But our understanding was that they were going to be disclosed to the State, that they certainly weren't going to be, you know, tacked up on the bulletin board downstairs and limited to these gentlemen here. And perhaps you're right. Perh_ps it won't become an issue.

But we did point out in our brief when we moved for a protective order that there is a very strong and long line of cases from the United States Supreme Court that says that you can't trade one right for another.

And, yes, obviously, the State is entitled to this material. We gave them a lot of it, and then you gave them more. And we are not squawking about that. But at some point we feel that the constitutional line might become overstepped. And I suppose we will have to carefully watch and see how that goes in the hearing.

MR. FREEDMAN: The practical way of dealing with this, Your Honor, might be simply that they and we not offer them into evidence where they become part of the Court record, for the benefit of the Supreme [414] Court and any review of the Court, sealed. And so as long as – he can ask any questions he likes. And as long as he doesn't then proceed to offer them, that will be a practical accommodation that I think might meet everyone's interests.

THE COURT: Go ahead, Mr. Marky.

MR. MARKY: If you would look at the deposition of Mr. Corin, he couldn't testify to anything unless he was looking at his record. That was his whole position for two hours.

Now for us to try to present a case under those circumstances and not use the records would be – plus, Your Honor, let the record be clear, confidential attorney/client privilege once it is waived, it is waived for all purposes.

And the case law is clear, and the Florida Supreme Court upheld it. Now, I submit to you they want you to overrule the Supreme Court.

MR. FREEDMAN: Your Honor, we have no problem with him handing –

THE COURT: Right.

MR. FREEDMAN: And, of course, we disagree about waiver. We will argue that one out in our motion to bar the new trial on constitutional grounds if necessary.

[415] THE COURT: All right. What I anticipate, Mr. Freedman, just so you understand. I don't think it is going to make a lot of sense – and it may make sense in some context. In other words, if Mr. Corin is refreshing his recollection with his records or referring to other parts of the file, I certainly can't see any way we can develop an appropriate record here without reference to what it is we are talking about.

So in other words, I think we will have to generally deal with those issues. I don't want this to completely grind the hearing to a halt. But as I said, if there is an extraordinary issue that you want me to consider – because as I indicated in my motion, regrettably I could not read many of the documents because they are handwritten.

And my feeling was that from what I could read there was no evidence of other crimes, which I was very carefully looking for in order to protect based on my understanding of the case. I did not see that.

Now, if you-all have identified something like that that I need to address before it is exposed, please let me know. That's what I am talking about, Mr. Marky, just any particular issue that would have [416] been subject to disclosure but not as I would have intended because I simply could not read the documents.

So that's the kind of thing I am looking for; and I think you, certainly, have preserved your record, Mr. Lang and Mr. Freedman.

MR. LANG: Now, Your Honor, we do have one more issue. If you like that one, you are going to love this one.

THE COURT: Okay.

MR. LANG: We are in a bit of a paradoxical situation here in the sense that the State has put Mr. Nixon on their witness list. And, obviously, examination of Mr. Nixon is going to involve things that are definitely germane here, but at the same time the right not to incriminate oneself may come into play.

And, therefore, I think we have to be very careful in following that line of questioning, whatever line of questioning the State tends to pursue, that we are attune to the fact that it would be improper. And I guess this is in the nature – they only put Mr. Nixon on the list yesterday.

It's in the nature, I guess, of a motion in limine. I think we have to be very careful to [417] distinguish between asking Mr. Nixon questions about what he said to Mr. Corin and vice versa and asking him questions about the underlying crime.

And, for example, to put the point bluntly, whether he did it or he didn't do it or did he do this or did he do that? Because, obviously, that would implicate adversely his Fifth Amendment rights. And so I think we need to – I guess what I am saying is that we would find any questions along those lines to be objectionable.

THE COURT: Mr. Evans?

MR. EVANS: I have prepared a memo on that particular issue. By filing his motion Mr. Nixon has already testified. He is the one who swore to the facts in the motion. So he has waived his Fifth Amendment rights in this hearing because he has already put sworn testimony before the Court that the Court

has considered in light of the fact that we are here for a hearing today.

Therefore, if he invokes his Fifth Amendment right privilege, under the Florida law as cited in that memoranda this petition should be dismissed with prejudice; and this ball game is over with.

THE COURT: Well, it is my understanding, Mr. Lang, that you anticipate that Mr. Nixon would [418] take his – or invoke the Fifth Amendment privilege in regard to his entire testimony?

MR. LANG: No, not at all, Your Honor.

THE COURT: Or are you talking about perhaps evidence of other crimes that we've just discussed or something to that effect?

MR. LANG: Not at all. The privilege in our view – and I've just been handed this. There is no way that I can respond to it standing up here. The privilege would only be invoked with respect to whether or not he actually did the crime, not with respect to whether or not he had a particular conversation with Mr. Corin, whether or not – or with law enforcement.

You know, for example, there is a confession. There is no secret about that. The State is perfectly entitled to ask Mr. Nixon whether or not that's his confession, whether or not he signed it. But they are not entitled to put him on the witness stand here, basically throw away his cloak of Fifth Amendment protection against self-incrimination, and say, okay, now tell us whether or not you did it.

MR. EVANS: Your Honor, at this stage I didn't put him on the witness stand. They put sworn testimony [419] before this Court by filing the motion. The Fifth Amendment privilege has

been waived. And once it is waived, it is waived as to all the issues once he takes the stand in regards to this case.

THE COURT: Let me ask you this though. Of what relevance would it be whether or not he committed the crime?

MR. EVANS: Your Honor, as we are developing the record when it goes toward the strategy, Mr. Corin had an opportunity to discuss openly and unincumbered by any Fifth Amendment privilege as to what Mr. Nixon's version of events were. And based upon the stories he was told by Mr. Nixon, he had to develop a strategy.

And he had to discuss that strategy if it was in conflict in any way with Mr. Nixon as to what the final strategy to put forth at trial was going to be. And because of that, we need to know what Mr. Corin knew, what he discussed with the defendant in order to get to the ultimate strategy that was put forth in the case and whether or not Mr. Nixon consented to it.

We need to know the mental states of both Mr. Corin and the defendant in accepting this defense that was ultimately put forth at trial. So it is [420] necessary to know what Mr. Corin knew from Mr. Nixon, what Mr. Nixon told Mr. Corin, or what they remember telling or not telling each other. And at this stage he had already testified by virtue of his motion. So privilege is waived.

MR. FREEDMAN: Your Honor, we have no objection to anything counsel described, none of which answers your question.

THE COURT: Well, of course, I think what Mr. Evans is alluding to is he does intend to ask that question. I just don't know – I am not terribly convinced that whether Mr. Nixon committed the crime or not is relevant.

What he said in that regard – now, perhaps some general conversations certainly that were held between Mr. Nixon and Mr. Corin about his involvement in the offense would be very relevant.

MR. EVANS: One of the things, Your Honor, is if Mr. Nixon told Mr. Corin that he committed the crime, then Mr. Corin was then put in an ethical dilemma of the situation. He could not knowingly put on perjured testimony.

And if Mr. Nixon confessed to it, then he couldn't put Mr. Nixon on. If Mr. Nixon told him he did it, then he could not put on other witnesses who [421] would say Mr. Nixon's didn't do it. Or he couldn't put on evidence that would tend to show maybe somebody else did it because Mr. Nixon had already told him that.

So those avenues of defenses would have been blocked by Mr. Nixon's comments to Mr. Corin.

THE COURT: All right. Let's get to that point. All right. In other words, if Mr. Nixon is called as a witness by the State or if there is some cross-examination that is going to get into this area, then interpose the appropriate objection; and we will deal with it at that point in time.

I think knowing what the question is is going to be very important in where we are headed with it. So I will reserve ruling on the motion in limine until we actually reach the appropriate point in the proceedings.

MR. EVANS: And there were two preliminary matters I want to make sure we did. The information that was supplied from the Public Defender's Office pursuant to subpoena duces tecum and the Court's protective order, our understanding is that is part of the record that will be submitted to the appellate courts and something they can consider.

THE COURT: The protective order?

[422] MR. EVANS: No, the box of information that was filed under seal with the clerk's office that contained all the records.

MR. LANG: Yes, of course.

MR. EVANS: Okay. And the other thing is I have the original copies of the depositions that were taken. They have yet to be filed with the Court, and we would ask that they be also made part of the record. These are the depositions.

MR. LANG: There's no objection.

THE COURT: All right. And I'd appreciate if you'd hand them to me, Mr. Evans, because then I will have my own copy. Thank you.

MR. FREEDMAN: Are you ready for the first witness, Your Honor?

THE COURT: In just one second. Gentlemen, also I need to speak with our staff attorney for a second. The television folks want to come in. And, of course, we, obviously, have a policy in Florida of permitting that.

They should have been here earlier, and I probably should exclude them because I don't want to disrupt the proceedings. However, I will let them come in because I do need to take just a moment to speak with our staff attorney. So if they want to [423] come in now, if they can, do it real quick.

(Court is in recess.)

THE COURT: Gentlemen, are there any other preliminary issues to address?

MR. LANG: No, we are just waiting for Mr. Corin. We understand he will be here in a minute.

THE COURT: We will proceed with Mr. Nixon's case. Mr. Lang?

MR. LANG: Your Honor, my opening statement is going to be very brief. The Florida Supreme Court in our opinion has given us a very clear directive here.

The issue to determine in this evidentiary hearing is whether there was an affirmative and exclusive acceptance of Mr. Nixon's trial counsel's strategy to concede his guilt.

And the Court made clear, silent acquiescence is not enough. That being framed as the issue, we are prepared to call the trial attorney Mr. Corin to the witness stand.

THE COURT: Mr. Corin.

Whereupon,

MIKE CORIN

was called as a witness, having been first duly sworn, was [424] examined and testified as follows:

DIRECT EXAMINATION

BY MR. LANG:

Q. State your name.

A. Mike Corin.

Q. What is your current occupation, Mr. Corin?

A. Assistant public defender.

Q. And that's in Leon County?

A. Yes, sir.

Q. And what was your position in 1984 and 1985?

A. Assistant public defender, Leon County.

Q. And in that capacity did you represent Joe Elton Nixon in a murder trial?

A. Yes, sir, I did.

Q. Do you recall exactly when you began representing him?

A. In August, I think, of '84.

Q. Mr. Corin, in the course of your representing clients, do you have a practice of keeping notes of your meetings with them?

A. I do keep notes.

Q. Could you just briefly describe that?

A. Well, I take notes and stick them in the file of [425] every case I've ever had.

Q. And did you adhere to that practice in Mr. Nixon's case?

A. Yes, sir, I did.

Q. And did you produce those notes to the State Attorney?

A. Well, I answered an order of the Court, and they released them to the State.

Q. And did you have an opportunity yourself to review those notes recently?

A. Well, yes, sir.

Q. Now, going back to your time representing Mr. Nixon at trial, did there come a time when you formulated a strategy for trying this case?

A. Yes, sir.

Q. Could you briefly describe what that was?

A. Well, it was not to put on a defense. The strategy was to attempt to save his life.

Q. How did you intend to do that?

A. By trying to show that even though the State may have been able to prove the acts for which he was accused, there were good reasons he shouldn't be sentenced to death.

Q. So as a consequence of your opening statement, you conceded his guilt?

[426]A. Well, I think I probably indicated that the State was probably going to be able to prove the case.

Q. Now, did you explain that strategy to Mr. Nixon?

A. Yes, sir.

Q. And did he affirmatively consent to that strategy?

A. My best recollection would be consistent with, I think, the testimony I gave in a hearing in 1988. And there is a transcript of that hearing. And if he – he didn't sign a waiver. He didn't sign an acknowledgment, and my best recollection is he did nothing.

Q. Did he affirmatively consent?

A. Did he say, yes, sir, go for it, that's the way I want you to do the case? No, sir, he did not.

THE COURT: I'm sorry. Mr. Corin, what was your answer?

THE WITNESS: Did he affirmatively say, yes, that's what I want you to do, go for it? He did not do that.

BY MR. LANG:

Q. Now, do you recall after you made your opening statement whether there was any reaction by Mr. Nixon to the opening statement?

A. Well, from the brief review of my notes, it appears that may have been the following morning before [427] the commencement of court. I believe I met with him in a holding cell.

Mr. Marky is pointing at me I think. Can you hear me, or do you just want to point at me or something?

I believe I met with him in the holding cell. And he had seen a copy of the newspaper, and he was not pleased. And I believe the headline in the paper or the story in the paper was what I had done in the opening statement.

Q. Now, you testified before that you had previously testified in this matter back in 1988; is that correct?

A. I believe it was December of 1988.

Q. Right. December 19 of 1988 if that helps refresh your recollection. And have you had an opportunity to reread that testimony?

A. I've read that testimony.

Q. And is it correct that you just testified that that testimony also remains true and correct as of today?

A. To the best of my knowledge that was probably a more accurate statement of what occurred than anything I would recall today. I mean, it has been many, many years and many, many cases since then.

MR. LANG: That's all. No further questions.

THE COURT: Thank you, Mr. Lang.

[428] MR. FREEDMAN: Your Honor, we are not going to offer the transcript referred to since it is in the record, but we would be happy to provide you a copy for your convenience if you would like.

THE COURT: Thank you. I would appreciate that.

MR. EVANS: Is that the copy of the –

MR. FREEDMAN: December 19th hearing before Judge Hall.

THE COURT: And I think Mr. Freedman's understanding is this has already been made a part of the record,

but I don't have a copy of it right now. So he has just provided it to me.

MR. EVANS: It was referred to, I believe, in Judge Smith's rulings.

THE COURT: Right. Thank you. Mr. Evans?

CROSS-EXAMINATION

BY MR. EVANS:

Q. Mr. Corin, what was your experience as a criminal defense attorney in 1985?

A. My experience?

Q. Yes.

A. I started working in the State Public Defender's Office in 1976; and I stayed there until, I think, late '78 when I went with the Federal Defender's Office. And then I came back 18 months later, and I have been an [429] assistant public defender straight until this time.

Q. And what type of cases were you handling with the Public Defender's Office and the Federal Public Defender's Office?

A. During that period of time I handled every kind of case you can have.

Q. Misdemeanors?

A. Misdemeanors and parole violations, probation violations, felonies.

Q. All degrees of felonies?

A. Yes, sir.

Q. And what was your experience with death cases in 1985?

A. You mean in the trial of them or in appellate experience or –

Q. Both appellate and trial experience.

A. Well, I had worked in the Attorney General's Office for about four and a half years before I became – went out in private practice briefly and then went with the State Public Defender's Office. And I had worked on capital cases there for the State. And then I did capital appeals in the Public Defender's Office from, I think, when I got back there in 1980 until '81 – or '79 until '81. It was about an 18-month period of time.

Q. During your time as an appellate attorney [430] handling capital cases or appeals on capital cases, did you have an opportunity to review the records and see the type of strategies that other counsel had used in death cases?

A. I mean, writing a brief I reviewed transcripts, yes, sir.

Q. And what kind of trial experience did you have in capital cases in 1985?

A. I'm not sure exactly the extent of my experience – participation at that time. I mean, I know Gene Taylor and I handled a case here in town. I don't think I had any – I remember the Clifford Walker case, and then I probably had some other murder cases that may or may not have gone to trial.

But, I mean, I'm sorry, sir, but, you know, in all the years I have been a lawyer I represent a thousand clients a year on average. And I don't keep a track record if you know what I mean.

Q. Are cases in which the death penalty is sought by the State of Florida significant cases in your mind?

A. Sure.

Q. And do you think you would have some particular recollection of a capital case should you have handled it?

A. If you say a capital case did I have any clients sentenced to death other than Mr. Nixon prior to 1985, I [431] believe I didn't.

Q. Had you had any other cases that had went through a trial and –

A. Clifford Walker is the one that comes to mind.

Q. And so there had been one. And Mr. Walker was not sentenced to death; is that correct?

A. You are correct, sir.

Q. So this to your recollection would have been the second case you would have had that would have been tried through trial up to a penalty phase?

A. Probably.

Q. And that would be a rather significant case in your mind? It's the only case you've tried in your career that the

defendant wound up on death row. So my question is, is that a case that you think you would have some remembrance of?

A. I don't think that was your first question.

Q. Well –

A. If you ask me, is it a significant case? Yes, sir, it was very significant.

Q. Is it significant to you?

A. Have I thought about the case?

Q. Yes, sir.

A. I try not to, sir.

Q. You say you try not to. Does that mean you [432] still – even though you try not to you still think about the case every now and then?

A. Well, people keep bringing it up, sir.

Q. And did you know at the time that the trial strategy that you were going to use was going to be questioned at a later time should the defendant receive the death penalty or should he receive a life sentence?

A. I anticipated that people probably would be talking about it.

Q. Did you anticipate that the appellate courts would look over it?

A. Oh, I anticipate the appellate courts will look over every death case.

Q. Now, with that in mind, did you keep any detailed notes because –

A. No, sir. My notes were the same in his case as they would have been in other cases to my recollection. I mean, you can pull my files if you had the ability to and the notes would be just as – about the same as that depending upon the life of the litigation.

Q Now, you have said or indicated through your previous testimony that your memory had somewhat eroded about this case since 1985 whenever it was tried, that you can't recall some things that you may have recalled earlier?

[433]A. Well, that's probably true. I mean, I can't recall everything. I mean, you know, I got married in 1966. I remember where it was. If you asked me who was there – it was probably the most significant thing in my life, but I couldn't exactly tell you everybody who was there.

Q. You knowing that the case was going to be looked at at the time you tried it in 1985, knowing that there was – and then the hearing in 1988 and, I believe, another one in 1989 at which you testified –

A. That may be true. You're obviously more familiar with the case at this point in your life than I am at this point in my life.

Q. And then knowing that eventually even at the time the Supremes decided the case – and I believe in the 1990s that there would be an evidentiary hearing or there could be an evidentiary hearing at some point if the defendant filed a post-conviction motion, you didn't feel it incumbent upon yourself to record any of your recollections for the benefit of Mr. Nixon or for the benefit of the State?

A. Absolutely not. I felt no obligation to do anything other than appear pursuant to the subpoena. I did the best I could.

Q. Now, this case was not the first time you [434] represented Mr. Nixon, was it?

A. No, sir.

Q. When did you to your recollection first begin to represent Mr. Nixon?

A. Probably 1983, but I'm not sure.

Q. Do you remember what type of cases that you would have represented him on before this case?

A. As I recall – and, again, I don't know whether our office even has the files anymore. And I don't think they appear in CJIS, at least maybe one of them. There had been, I think, a robbery case and then an attempted burglary case.

Q. Now, during that time in those trials did you put forth a defense? Did you not contest the guilt of the defendant, or did you contest the guilt of the defendant in your strategy?

A. I believe if I'm not correct – and you might call Mr. Hankinson. He may have some recollection of this. There was a robbery case that was dropped by the State during – or during jury selection because as I recollect the victim – the alleged victim in that case had misidentified Mr. Nixon and confused him with a younger brother who she then identified as the perpetrator.

And the burglary case, you know, it is just [435] vague. I think it was an attempted burglary, and I don't remember exactly what the defense was or was not in that case. I believe that's the

case that was pending sentencing at the time of the situation that you're discussing today.

Q. Now, during the times of the robbery case since it got all the way up to jury selection and during the times of the attempted burglary case, did you have an opportunity to discuss trial strategy in those cases with Mr. Nixon?

A. I'm sure I did.

Q. And did you have a good rapport with him?

A. Yeah, I mean, I assume. You know, representing the accused in criminal cases, you know, your perception of what is good rapport may be different than theirs.

Q. I'm not asking for Mr. Nixon's perception. I am asking for your perception.

A. Do I recall that he complained about my representation at any point in time? Is that your question?

Q. No. I'm asking, did you consider that you had a good rapport in communicating with your client as to trial strategy in those other cases?

A. I don't know whether I considered it or not.

Q. Can you explain that answer?

[436]A. Do I independently recall him complaining about anything I was doing in those cases, no, I do not.

Q. Do you recall whether or not the time – your conversations you were having with Mr. Nixon about the trial strategy in those cases was a two-way street?

A. I don't independently recall any conversation I had with Mr. Nixon at that time.

Q. Do you recall if Mr. Nixon did the same thing you have just testified to that he did in this murder case was nothing?

A. I do not independently recall that at all, sir. one way or the other.

Q. Do you have any recollection of how the relationship with Mr. Nixon was during the time of those trials?

A. I think I had – my perception was that we got along fine. But, you know, my perception may be wrong.

Q. Now, Mr. Nixon had the ability to understand the proceedings that were taking place on the previous occasions during the robbery and the attempted burglary?

A. Yes, sir, I believe he did.

Q. How soon after the defendant was arrested did you get involved in representing him?

A. I think it was probably the night of the arrest, fairly shortly after he was arrested.

[437]Q. And would you have filed a written plea of not guilty in that case?

A. I may have. I mean, I assume I did. Sometimes I do them orally. Sometimes I do them in writing.

Q. Did Mr. Nixon direct you to file that written plea of not guilty, or did you file it as a matter of court of your representation?

A. Probably did it as a matter of course.

Q. Now, did you have an investigator assigned to you during that time period?

A. Probably – I mean, now that you have subpoenaed Tommy Moore, I assume Tommy was involved. I can't recall if anybody else was.

Q. But during that time period would Mr. Moore have been assigned to you only on this case, or would he have been an investigator assigned to you to help you on all your cases should you need him?

A. I have no recollection whether he was working on this case alone or other cases or whether he worked for me or several other lawyers in the office. The tradition is we have one investigator working for several lawyers. The tradition changes because we have different lawyers.

Q. How much time were you able to devote to the murder case?

A. I have no idea how many hours I spent working on [438] it, thinking about it. I did have a case load of other cases at the time.

Q. Now, how many pages of notes did you keep?

A. You have a copy of them. I mean, I got a copy here. If you want me to pull them out and count them, I will be happy to do it; but I don't independently recall how many pages of notes there were. I mean, there are copies in the file.

Q. If you don't mind pulling it out, I believe there is a number that has been placed on there by Mr. Lang's firm. And I believe it is maybe 56 pages of personal handwritten notes?

A. If that is what it says, that is what it is. You are talking about the interview notes in the Document Identification Number 1?

Q. Yes.

A. That appears at the top to have 59. I didn't write that. So I'm assuming the counting is correct, sir.

Q. Did you also have a fairly large number of pretrial and jury selection notes?

A. Yes, sir. Somebody has given me copies of the – we have the interview notes, and we have trial notes which I see Document ID Number 3 looks like some trial notes which may include other people.

And my notation on this one looks like at least [439] 70-some pages of notes. And then maybe there is another one here. These are more trial and deposition notes and things like that. I'm not sure how many pages there are. I don't think anybody has written at the top of those how many there are, you know, one through whatever.

Q. Does that stack appear to be about the size as the one with 70 pages in it?

A. I guess. I mean, you can weigh them out if you want.

Q. Did you take depositions of material witnesses involved in this case?

A. Yes, sir, I believe I did. I believe you have copies of them.

Q. And did you have an opportunity to meet with your client?

A. Yes, sir.

Q. And do you recall how many times?

A. No, sir.

Q. Did you keep notations of the number of times in your handwritten notes?

A. Yes, sir, I believe – you know, I mean, I am assuming that every time I met with him I took them, but I can't swear to that. But normally I would have kept a note every time I spoke with Mr. Nixon or virtually anybody about the case.

[440]Q. So the number of times that you noted in your notes would be at least a fair estimation of the number of times you met with Mr. Nixon?

A. There may have been other times, but may not have been. But the times that are noted in there it would have been a fact that I was meeting with Mr. Nixon.

Q. Now, did you discuss with Mr. Nixon the things that may need to be investigated in this case beyond what evidence the State had already put forth?

A. Probably did. I mean, I discussed with him the state of the evidence.

Q. And would you have discussed with him possible defense witnesses?

A. Probably did.

Q. Now, at some point you indicated that your strategy would be to try to avoid the death penalty and not contest guilt; is that correct?

A. Yes, sir.

Q. Do you recall what point in the litigation that that occurred?

A. No, sir.

Q. Would it have been a decision you would have made lightly?

A. No, sir.

Q. Would it have been a decision you would have [441] made without discussing it with Mr. Nixon?

A. No, sir.

Q. Why did you make the decision to pursue that strategy?

A. In my professional opinion that was the best way to proceed with the case at that time.

Q. Why was it the best way to proceed with the case at that time?

A. I felt based upon the state of the evidence that that may be the only way to save the gentleman's life.

Q. What other strategies did you discuss with Mr. Nixon?

A. I don't know. I mean, what other strategy are you talking about, you know, defense of insanity or alibi or something? I mean, I suspect we at some point discussed whatever we needed to discuss.

Q. Well, there were a number of psychiatrists or psychologists who had taken a look at Mr. Nixon; is that correct?

A. Well, I don't know what a number is. I think there were two that I conferred with, maybe Mr. Eckwall and Mr. Norman as I recall from my review of the notes.

Q. Did Mr. Nixon have a history of mental illness or mental problems or disabilities?

A. I think he has, yes.

[442]Q. And did you look into those as possible defenses in this case?

A. Yes, sir.

Q. And it was elected not to go with those defenses?

A. Well, if you're talking about insanity, I think there was not an insanity defense. There were a lot of mitigating circumstances due to his mental abilities or lack thereof or things like that.

Q. So there was not an insanity defense that could be taken in this case. Were there any other possible defenses that could have been taken like I'm innocent, I didn't do it?

A. That may have been a possible defense.

Q. Why was it not pursued?

A. Well, that was not what occurred.

Q. And what do you mean that was not what occurred? Was there no evidence that you found or any witnesses you found to put forth that defense?

MR. FREEDMAN: Objection, Your Honor.

THE COURT: What grounds, Mr. Freedman?

MR. FREEDMAN: If the question is that was not what occurred referring to what happened at the time of the crime, then we object for the reasons previously noted.

[443] If the question is that was not what occurred referring to what he did at trial, of course we have no objection to that. I just want to make sure that counsel's isn't asking the question that we objected to having asked of Mr. Nixon.

THE COURT: Well, I will overrule your objection to this question. Go ahead, Mr. Evans.

MR. EVANS: Can the court reporter reread the question?

(Reporter read back last question.)

A. If – well, I am trying to phrase my answer to the best of my ability. If there was an indication that there were some other witnesses or some other person who may have done this act, then I assume that we explored it and it was unavailing.

BY MR. EVANS:

Q. And that would have included an alibi defense as well?

A. Yes, sir, I assume it would have.

Q. Did you consider the possibility of putting on a defense of a lesser included offense, that the defendant wasn't guilty of first-degree murder but guilty of second-degree murder?

A. I assume I had thought about that at one time.

Q. You assume –

[444]A. Mr. Marky wants to say something to you I think.

Q. You said you assume. Did you?

A. You know, Mr. Evans, I am trying to answer the best I can, but there are things that I don't recall. There are things that I – this is a long time ago. A lot of things have occurred since then. I have tried not to think about the case for a long period of time.

Q. Now, you were aware that a lesser included defense was available to first-degree murder?

A. Well, I am not stupid; and I know that sometimes juries will find people guilty of lesser offenses. If you are asking me in my professional opinion did I think they would find him guilty of a lesser included offense in this case and not first-degree murder, in my professional opinion I didn't believe that was the case. And I believe that was the State's position all along.

Q. My question went, that would have been an option you would have known about at the time and an option you would have waived, you would have considered and would have been eventually rejected?

A. If you are asking me, did I consider that he might be found guilty of a lesser offense? I probably did.

If you are asking me if I thought on the state [445] of the evidence he would be in my professional opinion found guilty of a lesser offense, I don't believe he would have been.

Q. And would you have communicated to Mr. Nixon that these other defenses that could be put forth were not reasonable defenses in his case?

A. Yes, sir, I'm sure I probably advised him and gave him the best legal advice I could at the time.

Q. If Mr. Nixon would have told you to pursue these defenses, would you have pursued them?

A. Well, probably to some extent, but at some point a decision has to be made that they are unavailing.

Q. Did you reach that point in this case?

A. Well, apparently I did based upon the way I tried the case. Where that point reached, the date, time, and place I cannot recall.

Q. And would that point have been reached after discussions with Mr. Nixon?

A. Yes, sir, I'm sure it was.

Q. What did Mr. Nixon indicate to you a possible – his thoughts of defenses to this case would be?

A. I can't recall at this time specifically.

Q. Would he have related anything to you as possible defenses to his case?

A. He probably did.

[446]Q. And would you have talked to him about those?

A. I probably did.

Q. And would they have been rejected?

A. They probably were.

Q. And would Mr. Nixon – would he have had input in the rejection of those other defenses?

A. He probably did.

Q. He probably did or he did?

A. I assume he did.

Q. Would you have done this defense of not contesting guilt against Mr. Nixon's wishes?

A. No, sir. That's not to assume that he necessarily agreed.

Q. I think you have answered my question Mr. Corin, I think the Court will make that assumption and make that determination.

Did Mr. Nixon in some way give you any indication that he did not want to pursue the defense that was pursued?

A. Again, I think that question I've answered before maybe in the 1988 hearing. To the best of my recollection he did nothing. I think that's the answer to the question, but I can't be sure. I think that's what you are getting at.

Q. Did Mr. Nixon offer any help in the goal of [447] saving his life?

A. Not a whole heck of a lot.

Q. All right. What was the little heck of a lot?

A. Just the way he was. He told me something about his background and things like that. Most of it I had to do on my own. I really didn't get much cooperation from his family either.

Q. Did he give you any direction on how you were supposed to proceed in this case?

A. Very little, if any, that I recall.

Q. Can you describe the little?

A. I can't recall, sir.

Q. Did he tell you he wanted a trial in this case?

A. Well, we had no choice.

Q. No. What I am asking is not whether you had a choice or not. Did Mr. Nixon affirmatively tell you he wanted a trial in this case?

A. Well, if he knew that there were plea discussions going on, yes. I mean, it was just assumed all along from the beginning that this was a matter that was going to go to trial.

Q. Did he ever affirmatively state to you, I want a trial?

A. No, I just assumed he did since there was no [448] alternative.

Q. What was discussed in your meetings with the defendant?

A. I mean, I'm sure we discussed, you know, when the hearing is going to be, you know, when he was going to go to the Department of Corrections, what he told the police, why he told the police, I mean, it is all – you know, just discussed a lot of stuff.

Q. Along with the trial strategies in this case?

A. Yes, sir, I'm sure we did.

Q. Along with any leads you may have had on putting on a defense other than not contesting guilt?

A. I'm sure we did.

Q. Did you discuss the strategy of not contesting guilt with the defendant?

A. I thought I answered it. But if I didn't answer it, then, yes, he was advised as to that, yes.

Q. And how did he respond?

A. To the best of my knowledge, again, he did nothing, except after it occurred then he was not real pleased. And I think I answered that before also.

Q. Now, what do you mean by he did nothing?

A. He did nothing. I don't know. I don't know what else I can say, Mr. Evans. I have said it before.

Q. Did you talk to him about the strategy more than [449] one time?

A. I believe I did.

Q. And what was his response the other times?

A. I believe, again, he did nothing.

Q. If he refused to respond, why did you continue to attempt to discuss it with him?

A. Apparently, the same reason I am attempting to answer your questions. It just keeps coming up and coming up. I mean, I am trying to do the best I can; but I can't tell you, you know, how many times.

Q. I am not asking how many times. I am asking why did you continue to discuss that strategy with him if he never responded to you whenever you brought it up?

A. Well, because, you know, I just felt I owed it to my client to tell him what's going on.

Q. I believe you previously testified you, in fact, pled with him to give you some input as to the trial strategy?

A. Well, if I said that, then I said it.

Q. Do you recall if that occurred?

A. If I said it, it probably occurred. I don't know when I said it or exactly in the context I said it. If I said it, I said it.

Q. Would at any time you have told Mr. Nixon, Mr. Nixon you are on trial here, the State is seeking the [450] death penalty, this is the – you know, we need to put forth a defense, this is the one I think is the best is not – to concede guilt but at

the penalty phase try to save your life, talk to me, tell me something, I need some input?

A. I'm not sure I approached it in that way.

Q. In what way do you think you would have approached it?

A. I have no recollection, sir.

Q Would you have been trying to get that point across to Mr. Nixon?

A. I probably did.

Q. And were you successful in getting that point across?

A. I don't know.

Q. What do you mean you don't know?

A. I don't know.

Q. Did he –

A. I don't know whether he understood it, whether he accepted it or rejected it. To the best of my knowledge he did nothing.

Q. You had discussions with Mr. Nixon during this time period of your representation of him, correct?

Did you have discussions with Mr. Nixon during the period – this period of time?

[451]A. Which period of time?

Q. The period of time you started representing him up until the trial?

A. Yes, sir. You've asked me that question. You've asked me about my notes.

Q. Did you have conversations with him, or were they one-sided conversations? Did Mr. Nixon –

A. Probably some of each.

Q. So Mr. Nixon would interact with you during your interview sessions with him? Y'all could carry on –

A. Sometimes, yeah.

Q. But when the issue of the trial strategy came up, he refused to respond?

A. He did nothing affirmative or negative.

Q. Did the defendant at some time tell you a story that was different from the events he related to the police?

A. I'm sure he did.

Q. Why was the defendant's story not used then in the testimony?

A. I don't recall specifically why it was, but it probably was because it was either not supported by any evidence or witnesses or was –

Q. Or was what?

A. Not worth proceeding.

[452]Q. Why wouldn't it have been worth proceeding?

A. For the first part of the answer, it was not supported by the evidence of witnesses.

Q. Now during the depo back on May 9th of this year, you indicated to me that I not having been a defense lawyer did not understand how it is to represent human beings in this case or in cases like this or in criminal cases?

A. Well, that's possibly correct. I mean, I probably said that, and I probably meant it. If you haven't experienced representing the accused in criminal cases, you don't know exactly how it occurs. And each case is different, but each client is different. And some clients are helpful. Some are not helpful.

Q. In the cases where clients are not helpful, what is it like to be a defendant attorney?

A. It's a pretty tough job.

Q. Why?

A. Because you hope that you have clients that are cooperative.

Q. And if they are not cooperative, how do you handle it?

A. You do the best you can.

Q. And what do you mean by do the best you can?

A. You represent them to the best of your ability. [453] That's what I've tried to do all these years, Mr. Evans.

Q. And do you feel that you did that in Mr. Nixon's case?

A. Well, yeah, I think I did. But, you know, I suspect 15, 16 years after the fact or 5 years or 7 years – you know, people as Mr. Marky used to want to tell me in the Attorney General's Office, people flyspeck the record and Monday morning quarterback and second guess and why didn't you do this and why did you do that.

I mean, I suspect at the time the transcript – Judge Hall thought I was just one brilliant sucker. Now people might think I am just one worthless attorney, you know. But I try to do the best I can with what I have.

MR. EVANS: Your Honor, do you have a copy of the depo of Mr. Corin on May 9th?

THE COURT: Yes.

BY MR. EVANS:

Q. Mr. Corin, do you remember exactly what you said on page 19 of the second volume?

A. The Judge apparently has a copy. You've got a copy. They've got a copy. I don't have a copy.

Q. All right. That was my point. I wanted to be able to provide you with a copy. I first wanted to ask if you had any specific recollection as to exactly what you said.

[454]A. All right. I have page 19.

Q. Do you see the reference I am talking about?

A. Which specifically? Go ahead. I mean, go ahead and tell what line to direct me to.

Q. I haven't got mine with me – beginning with line 2.

A.[sic] Mr. Corin, have you had an opportunity to read over the material?

You are referring to my – all these notes, these pages of notes, year, I read through them.

Q. No, you had the wrong volume.

A. I will give it back. My fault.

Q. This is one by Ms. Winn as opposed to Ms. Hussey. It is a continuation, page 19, line 2.

A. Well, my point – well, okay?

Q. Yes, continue.

A. I am not going to argue with you. But you've never been a criminal defense lawyer. So you don't really understand exactly how it is that you represent human beings in cases. And it is just not all black and white, cut and dry. There are many times –

Q. You are going to have to try that one a little bit slower. The court reporter was having a hard time keeping up with you.

A. All right. Well, my point – well, okay. I am [455] not going to argue with you. But you've never been a criminal defense lawyer. So you don't really understand exactly how it is that you represent human beings in cases. And it is just

not all black and white, cut and dry. There are many times lawyers make decisions because they have to make them because the client does nothing.

Q. Now, do you feel in this case that you were put in that position that you had to make the decisions because the client did nothing?

A. Yes, sir. Did you want me to keep this open?

Q. No. That was it. Now, when you say Mr. Nixon did nothing in response to you trying to discuss with him the trial strategy of not contesting guilt but trying to save his life, when you say he did nothing explain what nothing means.

A. I think I testified, again, in 1988. And I think I've said before that he did nothing. He didn't say, yes, go for it or don't do it. He did nothing.

Q. Would this discussion have taken place at the Leon County Jail?

A. Well, I don't recall that it would have occurred anywhere else other than jail or perhaps in a holding cell here at the courthouse.

Q. And you would have had an opportunity to have a two-way conversation in private with Mr. Nixon?

[456]A. As I recall, there was never anybody physically with us when we discussed things – well, I take that back. There was probably a time when maybe a bailiff was available in and around the holding cell here but not at the jail.

Q. Now, did Mr. Nixon whenever you say he did nothing, did he refuse to answer your questions when you asked him what he wanted to do or if this strategy was okay with him?

A. As I recall he did nothing.

Q. Did he get up and leave the room?

A. As I recall, he never walked out of a conversation that I had at the jail, but I could be wrong.

Q. Do you ever recall him walking out of a conversation about the trial strategy that was used?

A. No, sir. Now, again, I do recall that – as I recall from my notes, my review of the notes, that the day of the – after opening statements he was not pleased when he apparently read about it in the paper.

Q. But that would have been after the decision would have been made to go forth with that trial strategy, wouldn't it?

A. Yeah.

Q. Sort of like about the horse getting out of the barn after –

[457]A. Well, yes, sir. I would have been reported in the paper.

Q. Now, he never indicated to you either verbally or by holding his hands up or by shaking his head or in any manner that he did not want the strategy you proposed and you followed through with – conducted at his trial?

A. My best recollection of the situation those many years ago is he did nothing. That's my best recollection, and I can't change it. I can't remember anything else.

Q. Now, you never filed a motion to withdraw in this case, did you?

A. No, I guess I didn't. You're telling me. You reviewed the record. I guess I didn't.

Q. It is a question. Did you ever file –

A. I don't recall filing one. I suspect I would have remembered that.

Q. If you would have had reason or grounds – legal grounds to file a motion to withdraw in the case, would you have filed a motion to withdraw in the case?

A. What would you consider legal grounds?

Q. The appellate record is full of what legal grounds are.

A. What would you consider them to be? Because the client doesn't like you? Well, if a client tells me I don't like you, you're crappy, you're a public defender, [458] and I want another lawyer, I will bring it to the Court's attention. And they can make inquiry as to whether the client wants another lawyer.

If I feel like I have an ethical conflict of interest because I might have to cross-examine a current or former client, I file a conflict. And that – generally at that point it wouldn't be brought to the Court's attention. It just goes to the Court Administrator.

Q. If you would have had to put on what you believed was perjured testimony, would you have raised the issue?

A. I've never had that situation, sir.

Q. All right. So with that being the particular case, the fact that you did not file a conflict in Mr. Nixon's case or a motion to withdraw in Mr. Nixon's case, we can assume what you just related did not occur in Mr. Nixon's case, that he did not want you fired, that he did not want you to put on perjured testimony, that there was no other conflict in the case that you were aware of?

A. It would be my routine practice if my client says, I don't want you to be my lawyer, bring it to the Court's attention, get me a hearing, get me a different judge – or a different lawyer, excuse me, then I would bring it to the Court's attention.

[459] If I had an ethical conflict, I don't go looking for cases. And as you well know, everybody in your office and the Judges all complain that we get out of a lot of cases. Well, you know, yeah, if I have a conflict, I am going to get out of it.

Q. So with the lack of any motion to withdraw being filed in this case, it is reasonable to conclude that what you just said did not occur or did not come up in Mr. Nixon's case?

A. It would be reasonable to assume that I was unaware of any ethical conflict in the representation of Mr. Nixon at that time. It would be reasonable to assume that he did not direct me to bring it to the Court's attention that he was dissatisfied with my services and wanted the appointment of other counsel.

Now, it may not be reasonable to assume that I didn't have an ethical conflict at the time because at the time we did not have access to CJIS. And so now quite often we will discover a conflict at the last minute because it turns out that people who are listed as witnesses in a given case will become our clients.

But, I mean, to the best of my knowledge I was nor – or our firm, our office, was not representing anybody who was a witness in the case which would have caused, you know, my filing of a conflict of interest.

[460]Q. Did you ever file a motion to declare the defendant incompetent?

A. I don't believe I did.

Q. And did you have either a psychologist or psychiatrist take a look at Mr. Nixon?

A. I believe I did.

Q. And are you aware of any basis for filing a motion to declare Mr. Nixon –

A. I believe if I was aware of a basis that he was not competent, I would have filed the motion.

Q. Now, as to the strategy of not contesting guilt, how did you feel by not contesting guilt that that would somehow aid in the saving of Mr. Nixon from receiving the death penalty?

A. Why did that – well, I don't know exactly how to phrase it. But Bob Dylan, I think, wrote a song saying you don't need a weatherman to tell which way the wind blows.

And so if it looks like it's not going to be a matter that is subject to any reasonable dispute, then in my opinion it would be more credible to attempt to save the man's life through indicating that there were reasons to spare his life through mitigating circumstances than going through a trial and arguing things that were not going to make a whole lot of sense.

[461]Q. Did you discuss the decision of not contesting guilt with any other attorneys?

A. Yeah, probably did, probably did.

Q. And would they have included attorneys in the Public Defender's Office as well as other private counsel?

A. Well, you mean personally whether I had discussions with anybody other than people in my office with regard to specifically Mr. Nixon, I probably didn't outside tne office.

If that strategy which people call a strategy – you know, if that way of defending a human being is a strategy and if you're asking n[illegible] do I know of other lawyers outside of my office who have discussed that strategy or that tactic or whatever, yes. The answer is yes.

Q. And who were the people in your office you would have discussed it with?

A. I can't tell you who works there today much less who was working there in 1984.

Q. Who was the public defender at that time?

A. '84? Let me see. That would have been Mr. Michael Allen.

Q. Would you have discussed it with Mr. Allen?

A. Probably not.

Q. Would Mr. Minerva have been working there?

[462]A. I don't know whether he was back at that time. You know, Mr. Allen whopped Mr. Minerva's butt in an election. So there was a period of time when Mr. Minerva was otherwise employed. But then being a good defense lawyer and Mr. Allen being a nice man, he came back to work. But whether he was there at the time, I don't know.

Q. Was Mr. Taylor there?

A. Yes, sir, Mr. Taylor was there.

Q. Would this have been something you would have discussed with Mr. Taylor?

A. Could have been.

Q. Would you have discussed it with the senior lawyers in the Public Defender's Office, someone who would have experience with death cases or capital cases?

A. I suspect at that time – I don't know who you are referring to other than Gene and I. I mean, if you give me a list of names, I may have discussed it with everybody in the office or I may have discussed it with nobody.

But, you know, I probably discussed it with somebody. And going through my notes I don't recall a note of having – you know, like sitting down and saying, okay, we sat around and did this. But, you know, I wouldn't have normally taken a note if I walked by somebody's office and discussed something with them.

[463]Q. Would this have been a strategy that would have been an original idea, or would you have gotten it from some other source?

A. Well, some people claim I never had an original idea in my life. And other people say I am so doggone inventive. I don't know. I don't know where exactly it arose, but I suspect I didn't dream it up on my own.

Q. Would your previous experience in handling death penalty appeals have entered into the decision to use the strategy?

A. It may have influenced me to some extent. I mean, I suspect I am influenced by everything I have ever done. And I have handled capital murder cases.

Q. Had you talked at this time at a public defender seminar involving the death penalty?

A. Had I? Yes, sir, I think I did. I think in 1980 or '81 we started a thing called Life over Death. And we used to meet every 12 to 18 months in Crystal River, Florida. And then they moved elsewhere. But I think I had been on – you know, been an attendee at several of those.

Q. And had you been an instructor at any of those?

A. Yeah, I think I have.

Q. So this was not an area of law that you were unfamiliar with?

[464]A. No, sir.

Q. And at those particular seminars were possible strategies discussed?

A. Yes, sir.

Q. Would this have been one of the possible strategies that was discussed?

A. Could have been. I could give you sort of an analogy if you want; but if you don't, I won't.

Q. I don't think so.

A. Okay.

Q. Now, there was something that came up during your depo. It would be the continuation of page 17. It would be toward the bottom beginning at line 18, through 23.

A. You want me to go ahead and read it again?

Q. Yes, I do.

A. I will read it slowly.

Answer: I mean, I don't recall since 1984 specifically sitting in a room and discussing exactly what occurred and jotting his reactions and videotaping. I don't have that kind of recollection. I did take notes. My notes are what they are. The best I can recollect is what I recollect. It may or may not be true, but that's the best I can recollect.

Q. What do you mean by it may or may not be true?

[465]A. I don't know whether my recollections are true or not. They are my recollections. You know, I have lived with this situation for many years. And, you know, it is just – I am a human being.

And every time you think about something, you color things one way or another. You look at things in a different light. You look at things in a different way. And I've tried not

to think about this all that often in the last 15 or 16 years. But like I say, it keeps coming up.

And if you tell me – you know, if you tell me what occurred in this courtroom today two weeks from now, you know, if I watch the camera and I listen to the tape, I can say, yeah, that's what happened. But, you know, if you're asking me to identify who is coming in and out of this courtroom or exactly what happened, I will give you my best recollection. That's all I can do.

Q. Now, you're [sic] notes, do they reflect that the defendant said nothing, or do they reflect the defendant's response whatsoever?

A. I don't know – I mean, I would have to go through them again. But I think they don't reflect anything either way. I think – as I recall my notations from going through, it said, discuss strategy. And I don't recall that there was anything else written one way [466] or the other.

Q. Why would there have not been a notation?

A. I just didn't make a notation.

Q. Did you make notations of significant events in this case?

A. Sometimes, yeah. Maybe I didn't record everything that was of significance. But I try to do what I do. I mean, I don't know what to tell you. If you are saying I did something wrong because I didn't write a note, then maybe I did.

Q. No. What I am getting at – there were notations abut the defendant wanting a radio, the defendant needing clothes, the defendant wanting to talk to his mama, the defendant

wanting to see somebody or do this, notes of the most minimal nature about events.

A. Not to my client they are not.

Q. But when it came to something as significant as Mr. Nixon's reactions to the discussions of strategy, there are no notes?

A. I suggest the significance of that is more apparent to you than it was to me at the time. I think Mr. Marky wants to say something.

Q. I think he indicated he didn't consider that an answer. Now, why were there no notes of that?

A. I have no idea, sir.

[467]Q. You made the notes, and you have no idea why you didn't write something down that you knew would later be of utmost significance because –

A. I did not know that. You are saying it is of utmost importance. I did not know anything was going to be of utmost importance.

Q. Now, at this stage when you were taking notes and discussing with Mr. Nixon, you had an opportunity – of your experience you had the opportunity to discuss with other lawyers the strategy of conceding that the State was going to be able to prove its case beyond a reasonable doubt or not contesting the guilt of the defendant. That was the strategy you employed, was it not?

A. What's your question?

Q. My question then is –

A. You know what I did. I can't change what I did. If you call it a strategy, then you can assume it is a strategy. If you call it a tactic, it is a tactic. It is a matter of fact what occurred.

Q. And you indicated earlier that you knew that this would be reviewed by the appellate courts in detail?

A. Of course, in a death case all matters are automatically reviewed.

Q. And you thought enough of this strategy and developing this strategy to discuss it with the defendant, [468] to discuss it with other lawyers –

A. Now, wait a minute. I don't think I said I discussed it with other lawyers. I said, I may have discussed it with other lawyers. And I probably discussed it. But if I did, I can't tell you exactly who it would have been.

Q. But this was a significant decision in this case that you knew would have repercussions at a later date?

A. No, I didn't know that it was necessarily going to have repercussions. In fact, most lawyers are unfaltering optimists. And, you know, I suspected in my infinite capacity for forgiveness and hoping as to hope that things will come out the right way, I was kind of hoping this would never go any further.

Q. And you did not consider the fact that you were using this strategy and Mr. Nixon's response to it significant enough to put in your notes except for two occasions?

A. I did not write anything down in my notes about that to my recollection.

Q. Now, at some point you had an opportunity to discuss with Mr. Guarisco a plea agreement?

A. Yes, sir.

Q. And there are reference to your notes that the plea was for all day. What does that mean?

[469]A. Life.

Q. Now, did you get Mr. Nixon's permission to discuss a plea to life with Mr. Guarisco?

A. I don't recall if I specifically did or not.

Q. Would it have been something you would have discussed with Mr. Nixon?

A. It may or may not have been. Many times as a defense lawyer I believe it is in my client's best interest to secure or to attempt to secure a plea negotiation. And whether I get advance permission to do that, probably a huge percentage of the time I do not. And, of course, they always have a right to reject it anyway.

Q. Now, on page 3 of your notes – and I'm referring to what would be page 3 of the Document ID Number 1, the Michael M. Corin review notes – or interview notes, excuse me.

A. Yes, sir.

Q. Now, at the bottom there –

A. The very bottom?

Q. Just above where it says Mike, the seven, either twelve or twenty-two, eighty five?

A. Right, the p.m. notation?

Q. Yes.

A. Yes, sir.

[470]Q. What is the last line of that notation?

A. You want the whole note, or you just want me to say what it appears that my writing was? The entire notation appears that on July the 22nd of 1985 sometime in the afternoon the defendant's mother, Ms. Nixon, called my house, reference testimony/subpoena. I begged her to come to court Wednesday. She wants no part of it. And the last part looks like, admits defendant not right. And I may have put like an exclamation point. I believe that's the substance of that notation.

Q. And so that notation is not right – the defendant not right. That was something that was made by the –

A. By me – I mean, that was my notation probably referring back to something that his mother had said.

Q. So at that stage of this particular hearing, his mother was not willing to help in this defense or –

A. That was my impression, yes sir.

THE COURT: Mr. Evans, before you proceed, if I could just clarify. The notation or the actual note is that, it's not right? Is that correct? In the document can you –

THE WITNESS: You mean my handwriting?

THE COURT: Yes. What does your handwriting say?

[471] THE WITNESS: The notation – let me read it again. July – or 7-22-85-p.m. D's mom, meaning Mr. Nixon's mother, Ms. Nixon, called house, reference testimony/subpoena – I begged her to come to court Wednesday, I believe. She wants no part of it.

And then my next line says, admits – and I assume I am referring back to Ms. Nixon, although, you know, I can't be sure – that D, the defendant, is not – or D not right, is not right, not mentally together or, you know, not what you call your normal kind of person.

THE COURT: Thank you, Mr. Evans and Mr. Corin.

BY MR. EVANS:

Q. Now, at the time that you started putting forth the defense – or putting forth or engaging in the strategy of not contesting the guilt to the jury, did you feel that you had been put in the position of having to make the decision on the appropriate strategy in the case because Mr. Defendant had abandoned his responsibilities as a criminal defendant in giving you some guidance in how he wanted to be defended in this case.

MR. FREEDMAN: Object to the form, Your Honor.

THE COURT: Could you rephrase that, Mr. Evans?

BY MR. EVANS:

[472]Q. Did Mr. Nixon abandon his responsibilities in giving you some guidance no how this case should be defended?

A. I don't know that a defendant has any required responsibilities to do anything. But if you're asking did he tell me, again, that I want you to do this or I don't, no, he didn't.

Q. No. What I'm asking you is, did he give you any guidance on how he wanted to be defended?

A. Well, I've answered that question before as many times and as good as I can. If you're asking me again – and I think you phrased this kind of inadvertently as a defense, but then you said the word strategy – but did he give me guidance on this in terms of doing it or not doing it, no, he said nothing.

Q. No. Did he give you guidance on any strategy he wanted employed at this trial?

A. I think I answered – and I mean, I don't know what to tell you. I think I answered that question. We discussed other things at one point in time I'm sure. But when I told him that this is the strategy that I intended to employ, he did nothing.

Q. And my point is – and I think we've covered it. And this was part – since it was sort of a long question it assumed this part, the part – the fact that [473] Mr. Nixon and you had talked about other possible strategies in this case?

A. Yes, sir, I think I answered that question. And I think that was probably true.

Q. And I believe you've also answered that Mr. Nixon never told you he wanted any particular strategy followed or not followed?

A. Yes, sir, I believe that was my answer; and that's my best recollection.

Q. So that puts you in the position of being the captain of this ship because Mr. Nixon had abandoned his post?

A. That's one way you could phrase it, sir. I didn't phrase it that way, but you phrased it that way.

Q. But that was the result of Mr. Nixon's actions. You had to make the decision because –

A. Or inaction.

Q. Or inaction?

A. Yes, sir.

Q. But by Mr. Nixon's actions or inactions he left it solely up to you to make the decisions in this case because he refused your requests for help?

A. Well, I don't know that that latter part is correct.

Q. How did he help you then?

[474]A. I never said he did, did I? You are asking me, how did he help you? I never said he helped me.

Q. Did you ask him for his help?

A. I don't know that I ever phrased it that way. You know, back to the things like I made a note that he wanted batteries or he wanted clothes or he wanted a haircut or something, you know, the reason I make notes of that is because it is very important to some of my clients that are facing serious things to have the minor things in life convenient.

But that doesn't necessarily mean that they are also interested or not interested in the outcome of their case. You know, it is their daily life that they are more focused on than it is their forever future sometimes. That's not an unknowing occurrence.

Q. Is it your testimony that Mr. Nixon was facing the death penalty and he wasn't concerned about whether or not he was going to receive the death penalty?

A. I didn't say that. What I said is quite often clients will focus on minor things –

Q. And while I –

A. – to the –

THE COURT: Just one at a time for the court reporter.

BY MR. EVANS:

[475]Q. While I understand that, I'm asking about Mr. Nixon.

A. If you're asking me, was he focused on minor things as opposed to the big picture? Sometimes he was, yes, sir.

Q. And was he ever focused on the big picture of saving his life?

A. You have to ask him that.

Q. You were trying to represent him, and did you ask him if he was interested in saving his life?

A. I don't think I've ever asked any client directly that with that phraseology.

Q. Well, how about that general theme? If we are going to get down to nitpicking I am –

A. I'm not – sir –

Q. What about the general theme? Did you ever get to the point of inquiring whether or not Mr. Nixon wanted to be defended against this charge?

A. Well, I assume he did.

Q. What brought you to that assumption? Did he do anything to lead you to that assumption?

A. He didn't tell me to bring him to court and enter a plea of guilty.

Q. Did he tell you he wanted a trial?

A. He didn't tell me he wanted to enter a plea.

[476]Q. Did he tell you he wanted a trial?

A. I don't specifically recall whether he did or not. It didn't matter. Whether he wanted one or not, he was going to get one.

Q. He could have entered a plea straight up to the Court, couldn't he?

A. Well, he could have if he had asked for it, but he didn't ask for it.

Q. Did you discuss that possibility with him?

A. No, sir.

Q. Why not?

A. Well, because a plea straight up to the Court would have been unavailing. There would have been no benefit of that at all.

Q. In what way would it have been different than what you did?

A. I didn't plead him guilty.

Q. What did you do?

A. You read the transcript. You can determine what – everybody calls it something different. Some people say, well, you pled your client guilty. Other people say, you conceded that the State was going to have proof beyond and to the exclusion of every reasonable doubt.

Other people say, well, you didn't contest the [477] State's case in a vigorous fashion; and, thus, it is tantamount to a guilty plea. Other people say, well, you know, what choice did you have? You didn't argue something that common sense would tell you would be unavailing to the extent that credibility might be compromised at the second phase.

I mean, everybody calls it something different. I mean, it is what it is. I can't change what occurred.

Q. In your mind it is not tantamount to pleading your guy guilty?

A. No. I mean, I don't know. I mean, what does my mind matter? I mean, people have been studying this thing for years. And the Judge is going – it's what's in her mind that matters.

Q. I'm afraid that at this point what you were thinking at that time or what Mr. Nixon was thinking at the time or what the two of ya'll were communicating together or lack of communication at the time is directly relevant and very, very important to a determination of what occurred and why it occurred.

A. Well, I've answered your questions to the best of my ability. What goes on in his mind, hey, I'm not a shrink.

Q. But he never indicated to you that he wanted a trial in this case?

[478]A. I've told you before what I've told you, and I can't change what I've told you. I think I've answered the question. Maybe not.

Q. And he never indicated to you that he wanted to enter a guilty plea?

A. No, sir, he didn't indicate he wanted to enter a guilty plea.

Q. And he never indicated to you that he wanted his life to be saved?

A. Oh, I think – he never indicated he didn't want his life to be saved.

Q. All right.

A. So I assume that means that they don't want to die. I mean, I've had clients who at one point in their representation said, hey, I want to die.

Q. But my question –

A. And I take that with a grain of salt.

Q. But my question is, did Mr. Nixon tell you he did not want to be executed for this crime; or was that an assumption you made on your own?

A. I can't recall him specifically saying, Mike, you know, I don't want to be executed for this crime. I can't recall him saying that. It may have been just a foolish assumption on my part which has now created however many years of litigation which has the effect of [479] prolonging his life which I assume he wants.

THE COURT: Mr. Evans, if we could, at this point I think it is incumbent on me to call a brief recess so we can give our court reporter and everyone a little break. If we could take about 15 minutes, then we will return and perhaps conclude Mr. Corin's cross-examination.

(Court is in recess.)

THE COURT: All right. You may proceed, Mr. Evans.

BY MR. EVANS:

Q. Mr. Corin, we discussed previously about a plea to – I am assuming a plea as charged to a life sentence on Mr. Nixon's case that you had offered to the State?

A. Yes, sir.

Q. Now, did the State reject that offer?

A. Yes, sir.

Q. And who from the State was this offer discussed with?

A. I think my notes reflect that I talked to Mr. Guarisco and probably talked to Mr. Hankinson over the period of time. I mean, I probably tried several times to do something other than go to the trial. That's my nature.

Q. Mr. Guarisco and Mr. Hankinson were the trial [480] attorneys on the case?

A. As I recall.

Q. And Mr. Guarisco is and was the deputy state attorney of the Second Judicial Circuit at the time?

A. Yeah, probably so. I mean, I think he was gone for a while. But then I think that Mr. Meggs was the State Attorney the, and Mr. Modesitt had been unelected. Tony left for a while, and then came back.

Q. And do you recall any words that he used in rejecting?

A. I think my notes might have – and I put them away. But I think that there was a note there maybe of roll the dice. And I think that was probably attributable to him.

Q. And what did those words mean to you?

A. We are going to have a trial and let the chips fall where they may.

MR. EVANS: No further questions.

MR. LANG: We have no other questions.

THE COURT: All right. Very good.

MR. EVANS: I am assuming the defense has rested?

MR. LANG: Yes, that's correct.

THE COURT: All right. Very good. I thought there was another witness.

[481]MR. EVANS: We are waiting on Mr. Moore to come down.

THE COURT: All right. So you are going to be calling Mr. Moore as your witness then?

MR. EVANS: Yes. And, Your Honor, my concern as – about the notes, I believe Mr. Corin's notes as well as the other documents supplied to us from the Public Defender's Office and placed under seal with the Court, some of which were released to us unobjected to by the defense and others that were objected to by the defense but were released to us pursuant to your protective order, that those items need to be placed in evidence.

And we would ask that they would be placed as State's Exhibit 1 in this hearing. Now, how you want to manage those – we want those to be part of the record, part of the evidence in this hearing.

If you wish those to remain under seal from the public, then that's a decision you need to make and – but it is part of the evidence that the State is wanting to put forth at this hearing.

THE COURT: All right. Mr. Freedman?

MR. FREEDMAN: We object, Your Honor. First of all, if he was going to offer them into evidence, he should have done it with the witness on the stand.

[482] MR. EVANS: Well, he is a defense witness at this stage, Your Honor.

MR. FREEDMAN: And, second, and more to the point, everyone's interests have been served with these notes at the hearing for whatever use they had. Now, with respect to the appellate record, Your Honor has already taken care of that. So,

in effect, all you will be doing is creating another issue if you now put those into the record unnecessarily.

THE COURT: Well, here is what I will do. And certainly, gentlemen, in terms of the procedure that might be appropriate at a trial and for purposes of this hearing I would certainly view it a little differently.

I will allow the State to introduce the notes for whatever – certainly, some of them are relevant. And Mr. Corin has already discussed some of those relevant notes. Others are completely irrelevant. But to keep the entire package together I will admit them as State's Exhibit Number 1.

However, I will seal them. So in other words, they will be contained in the record in sealed envelopes so it will proceed up to the Supreme Court in that form, okay?

MR. EVANS: That is acceptable, Your Honor. And [483] for the purposes of why they are relevant, their case file from the Public Defender's Office indicates that there as a lot of investigation, a lot of thought, a lot of notes, including the jury selection notes that we referred to and the pretrial notes we referred to and the personal notes of Mr. Corin.

All of those are evidence that Mr. Corin thoroughly thought out the strategy before it was imposed, and it is evidence that he did so. And that was the relevance of those. And when Mr. Moore gets here, we will be calling him.

THE COURT: I'm sorry. Mr. Evans, your first witness will be –

MR. EVANS: Tommy Moore, the investigator at the Public Defender's Office, their chief investigator now.

(Brief pause.)

THE COURT: Mr. Moore, if you would raise you right hand, please.

Whereupon,

TOMMY MOORE

was called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EVANS:

[484]Q. Would you state your name for the record, please, sir.

A. My name is Tommy L. Moore.

Q. And what is your occupation?

A. Investigator – chief investigator, Public Defender's Office, Second Judicial Circuit.

Q. And how long have you been the chief investigator?

A. Probably about 10 years.

Q. And how long have you been an investigator at the Public Defender's Office?

A. Since 1973.

Q. And were you the investigator assigned to Mike Corin at the time of the Nixon case?

A. Yes, I was.

Q. And were you the only investigator on the Nixon case?

A. Yes.

Q. Now, what type of contact did you have with Mr. Nixon?

A. I seem to think I had maybe the initial interview and maybe one other contact with him.

Q. Would you have done a written report on the contacts that you would have done with him?

A. Yes.

[485]Q. Now, would you have discussed any trial strategy with Mr. Corin?

A. No.

Q. How about any trial strategy with Mr. Nixon?

A. No.

Q. Would you have accompanied Mr. Corin on any interviews of the defendant?

A. I don't remember accompanying him on any, no.

Q. Now, when you had an opportunity to talk to Mr. Nixon, did he appear to be mentally alert and able to comprehend what you were saying to him?

A. As I remember, I thought so.

Q. And did he appear to you that he understood that he was charged with murder and what the possible consequences were?

A. I think he understood what he was charged with. Again, I didn't get into a lot of the part of lawyering stuff.

Q. And is that something you explained to Mr. Nixon, that his lawyer would get into the substance of the offense?

A. Exactly, yeah.

Q. Before the trial did Mr. Corin contact you about having any problems with his – with him communicating with Mr. Nixon?

[486]A. Before the trial?

Q. Yes.

A. I'm not sure. I'm not sure. I know – like I said, I know at one time during court, but I'm not sure about any prior times. It's just been so long.

Q. But that would have been the trial itself that you are referring to?

A. Uh-huh.

Q. Now, did you have an opportunity on January 24, 1985 to interview Mr. Nixon at the Florida State Prison?

A. Yes.

Q. And what was the purpose of that interview?

A. To get some background information and, I guess, just background information basically.

Q. Background information including where he went to school and –

A. Right. Different parts of his life and who he had contact with, just some important people in his life as he came up through the years.

Q. And how long was that report that you –

A. Say that again, please.

Q. And how long was that report that you –

A. Say that again, please.

Q. How long was the report? How many pages?

A. It looks like about four and a half.

Q. And they are legal size pages?

A. Legal size, yes, sir –

[487] MR. FREEDMAN: Your Honor, that's the Document ID Number 6 that's being referred to.

THE COURT: Thank you.

MR. EVANS: It is in Document ID Number 6, the specific is the investigative memorandum from Tommy Moore on 1-24-85.

BY MR. EVANS:

Q. Now, there are approximately four and three quarter legal size pages of him giving you his background; is that correct?

A. Yes.

Q. So he was able to communicate with you and understand what you were asking for?

A. Yes.

Q. And he was able to put it in great detail?

A. I guess. I got the information I needed to work with. And that was, yeah, pretty detailed I guess.

Q. Now, at some point did you make a notation that Mr. Nixon had inquired as to the number of witnesses the State had and the State's witness list?

A. Yeah, I saw that in here somewhere yesterday if I can find it.

Q. I will refer you to page 4.

A. Page 4?

Q. The last paragraph where it says, defendant [488] asked me about the witness list.

A. That the State have against him – what was your question now?

Q. All right. Now, who made the inquiry? Did you bring the subject up, or did Mr. Nixon bring the subject up?

A. About?

Q. About the number of witnesses and the State's witness list.

A. According to my notes the defendant asked me about the witness list. I just appears from my notes here – I mean, from my memorandum there.

Q. And you also indicated to him that you were mainly concerned with the background at this point?

A. Right.

Q. And that his attorney would be discussing the other matters with him?

A. Exactly.

Q. Did he appear to you to understand that?

A. I think so.

Q. Did you make a notation in your report that he seems to understand this?

A. Right, I did.

Q. Did he indicate how many people he thought there would be called by the State?

[489]A. According to my memorandum he stated around 60 or 70.

Q. All right. And this was after you had told him that his lawyer would go over that?

A. I think that's the order of it, yes.

Q. And did you ask him how he guessed that?

A. I think I did. I asked him, how did he guess that? And he stated, from somewhere. He just heard it somewhere, I guess. I'm not sure how he came to that conclusion.

Q. That he had heard there were going to be quite a few witnesses?

A. I guess he had heard it through some source or whatever.

Q. Did he also indicate whether or not he should have made any statements to the police?

A. According to my notes, again, he stated that he felt like he shouldn't have made any statements. And I – according to my notes, I agreed with him.

Q. Did you indicate in your notes whether or not – what type of control the defendant had over himself?

A. Just a little nervous, you know, nervous laughter or nervous type of – whatever when somebody – I'm not sure what I'm saying other than –

Q. What did you write in your report?

[490]A. Defendant had a nervous laughter during the interview.

Q. And in that same sentence?

A. But seemed as though he was in control.

Q. And you indicated complete control, didn't you?

A. Complete control, yeah.

Q. And the next sentence, did the defendant appear to you to be anxious about what the State had against him?

A. Yes, uh-huh, and how the case was looking.

Q. And how the case was looking.

A. Yeah, how bad.

Q. Did he describe how the case was looking against him? What does the sentence say?

A. Okay. He was anxious to see what the State had against him and how bad the case was looking.

Q. And the next line?

A. He mentioned on several occasions to me that it looked pretty bad. I told him that I was not familiar enough with the actual pending case to agree or disagree on how the case was looking at this point.

Q. And you indicated again to him that his lawyer would go over that with him?

A. Right.

MR. EVANS: Your Honor, I believe this memo has previously been placed into evidence.

[491] THE COURT: As part of the sealed exhibit I assume.

MR. FREEDMAN: It hasn't been previously placed into evidence. But preserving our objection, if you wish to handle it

according to the way you just handled Exhibit 1 that would make sense.

THE COURT: All right.

BY MR. EVANS:

Q. In that case, Your Honor, Mr. Moore, did you use this information – was it recorded at the time that the events were fresh in your mind?

A. Yeah, within a day or two when I took the notes or whatever and got back to transcribe it and put in on my dictation.

Q. And have you relied upon this report in your testimony here today?

A. Completely.

Q. And is it, in fact, from what that appears to be that is your report?

A. Yes.

Q. You remember going and seeing Mr. Nixon on that day and doing your report?

A. Vaguely, I think so.

MR. EVANS: Your Honor, at this time we would move that in as State's Exhibit Number 2.

[492] THE COURT: All right. Just so the record is clear, again, in regard – and I'll have these exhibits or each exhibit as they were marked by the defense in regard to the protective order request – this is a separate exhibit, is it not, Mr. Moore's notes?

MR. EVANS: Yes.

MR. FREEDMAN: It is a part of Document ID Number 6.

THE COURT: All right. Well, we will identify that then as State's Exhibit Number 2. And this will be the package that is Document ID Number 6.

BY MR. EVANS:

Q. And all the reports contained in Document Number 6 are your notes?

A. Yes.

MR. EVANS: Okay.

THE COURT: And, again, for the purposes of the record, there was one document that was removed from the exhibit by the Court that would not – that would be sealed separately and not with the rest of the exhibits.

MR. EVANS: I believe we placed that document or the references of that document on record I think.

THE COURT: Keep them all straight. All right. [493] Any further questions, Mr. Evans?

MR. EVANS: No.

THE COURT: Mr Lang?

MR. LANG: Just one.

CROSS-EXAMINATION

BY MR LANG:

Q. Mr. Moore, did you ever hear Joe Nixon affirmatively consent to his lawyer conceding his guilt?

A. No.

MR. LANG: No other questions.

REDIRECT EXAMINATION

BY MR. EVANS:

Q. Mr. Moore, did you previously testify that you did not have any discussions with Mr. Corin or Mr. Nixon as to the strategy that was going to be used in this case?

A. Yes.

Q. When did you first learn of the strategy that was going to be used in the case?

A. I guess with everybody else after it was in the paper or later on in – you know, it was just out. It was after it happened.

Q. It was after the trial had commenced?

A. Right.

MR. EVANS: No further questions.

THE COURT: Any recross examination, Mr. Lang?

[494] MR. LANG: No, Your Honor.

MR. EVANS: The witness may be excused, Your Honor.

THE COURT: Thank you, Mr. Moore.

MR. EVANS: Your Honor, the State at this time would rest.

THE COURT: All right. What I will do, gentlemen – and, Mr. Lang, hopefully we can handle this informally. I will allow you-all to present your argument and the State to then present its argument.

MR. EVANS: Your Honor, Mr. Lang and I, I think, had indicated – I think Mr. Lang had indicated that this might be submitted in writing.

THE COURT: Oh, if you would prefer to do that –

MR. EVANS: I knew you had said something earlier on.

THE COURT: Let me say this, gentlemen. I do want to ask you-all for a memorandum from each side. And if you would prefer to just dispense with any oral argument today, that would be fine. I would be delighted to receive anything you would like to argue by way of memorandum.

But I would like to have you each in writing [495] articulate your positions formally for me before I draft my order. Would you –

MR. MARKY: The State would accept that.

THE COURT: Okay.

MR. LANG: Your Honor, if you prefer to have the written briefs or memoranda, then whatever we would say here we would – well, Mr. Marky would probably say it better orally than I would. But, certainly, I would say it better in writing than if I tried to speak about it.

MR. MARKY: You've got to be kidding.

THE COURT: I just certainly want to provide you with the opportunity to do anything you prefer to do by way of oral argument. But I am happy to receive the documents in writing if you prefer to do that. And I knew there has, obviously, been a lot written already in regard to this case. And I would be happy to just handle it that way. Is that all right?

MR. EVANS: I have no objection. I would love to rip and snort today, but my co-counsel has sort of reined me in on that issue.

THE COURT: The planets are not lined up properly if that's the case.

MR. LANG: So I guess we just need a schedule, I guess, that would key off of when the transcript is [496] available.

THE COURT: Good question. Sonia, I mean, a reasonable amount of time for you?

THE COURT REPORTER: Whenever you would like it, Judge.

THE COURT: Do you think in about 10 days the transcript would be available?

THE COURT REPORTER: That's fine.

THE COURT: The transcript will be available according to our wonderful court reporter here, in about 10 days. That would put us at – all right, Monday, May 21st hopefully the transcript will be available absent any unforeseen – and then, gentlemen, how much time do you feel you need to review the transcript and provide me with your written memoranda?

MR. EVANS: Your Honor, I'm wondering if – I'm assuming since the burden – are they going to file their memoranda, and then we respond to it? Or are they going to be contemporaneously filed?

THE COURT: You mean as to whether they will have an opportunity to reply?

MR. EVANS: Basically it is a situation where it's their motion, their burden. Are they going to put on, then we respond, and if they have anything to [497] reply?

THE COURT: My original intention was just to receive memoranda separately unless you-all feel if there is any – let me say this. Let me ask for your memoranda at the same time. And then if you want to respond, I will give you another date to do that, is that all right, to each other's position?

MR. LANG: That sounds fine, Your Honor.

MR. EVANS: That's fine.

THE COURT: Thirty days sound like –

MR. EVANS: Yeah, 30 days from the receipt of the transcript.

THE COURT: Thirty days after the transcript, so it would be essentially around June 21st. How about June 22nd which is a Friday?

MR. MARKY: That's fine.

MR. EVANS: And then either –

MR. FREEDMAN: A week for reply.

MR. EVANS: Let's do 15 days to reply. What is two weeks after that date?

THE COURT: That would be July 6th. All right. Just to review, gentlemen, then hopefully the transcript will be available to you on the 21st of March.

MR. EVANS: May.

[498] THE COURT: I'm sorry, May. It starts with an M – 21st of May. By June 22nd I'd ask that each side submit your memoranda to me. And then I will allow you until July 6th to respond to each other's memorandum or any further comments you would like to make about the other side's position by that time, okay?

MR. MARKY: Wonderful.

MR. FREEDMAN: Thank you, Your Honor.

THE COURT: Thank you, gentlemen, very much.

(End of proceedings.)

[499](Certificate of Reporter omitted in printing)

SUPREME COURT OF FLORIDA

Nos. SC92006, SC93192 & SC01-2486

JOE ELTON NIXON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

JOE ELTON NIXON,
Petitioner,

vs.

JAMES V. CROSBY, JR., etc.,
Respondent.

JOE ELTON NIXON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[July 10, 2003]

PER CURIAM.

Joe Elton Nixon, a prisoner under a sentence of death, appeals an order of the trial court denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. Additionally, he files a petition for writ of habeas corpus with this Court. We have jurisdiction. See art. V, § 3(b)(1),(9), Fla. Const. For the reasons that follow, we remand this case to the trial court for a new trial.

FACTS AND PROCEDURAL HISTORY

Joe Elton Nixon was charged, convicted, and sentenced to death for the 1984 murder of a Tallahassee woman. This Court affirmed the conviction and sentence on direct appeal. See Nixon v. State, 572 So.2d 1336 (Fla. 1990).[1] The United States Supreme Court denied Nixon's petition for a writ of certiorari. See Nixon v. Florida, 502 U.S. 854 (1991). Subsequently, in 1993, Nixon filed a rule 3.850 motion, which the trial court denied without an evidentiary hearing. Nixon appealed the trial court's summary denial of his 3.850 motion to this Court. Additionally, Nixon filed a petition for a writ of habeas corpus with this Court. Nixon raised seven issues relating to the denial

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[1] Hereinafter referred to as Nixon I.

of his rule 3.850 motion[2] and three issues in his habeas petition.[3] See Nixon v. Singletary, 758 So.2d 618 (Fla. 2000).[4]

In Nixon II, this Court found Nixon's claim that he was denied the effective assistance of counsel when his lawyer conceded guilt without his consent to be the primary issue in the case. Nixon's counsel made the following statement during opening argument of the guilt phase:

> In this case, there will be no question that Jeannie [sic] Bickner died a horrible, horrible, death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt. In this case, there won't be any question, none, whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement.

Nixon, 758 So.2d at 620.

During closing argument, Nixon's counsel made the following statement:

> Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case. In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms. I know you are not going to take this duty lightly, and I know what you will decide will be unanimous. I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson.

Id.

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[2] The issues raised in Nixon's appeal of the denial of his 3.850 motion were: (1) whether the circuit court denied him a full and fair hearing on his ineffective assistance of counsel claim; (2) whether he was denied his right not to be tried while mentally incompetent; (3) whether his death sentence had to be set aside because his counsel failed to make an effective argument for sparing his life and presented evidence that was harmful to his case during the sentencing phase of the trial; (4) whether he was denied a competent mental health evaluation in violation of Ake v. Oklahoma, 470 U.S. 68 (1985); (5) whether he was entitled to prove his claims under Johnson v. Mississippi, 486U.S. 578 (1988), that the two prior convictions used as aggravating circumstances lacked validity; (6) whether he should have the opportunity to prove that race discrimination tainted his conviction and death sentence; and (7) whether the jury weighed invalid and unconstitutionally vague aggravating circumstances in violation of James v. State, 615 So.2d 668 (Fla. 1993), and Jackson v. State, 648 So.2d 85 (Fla. 1994).

[3] In his habeas petition Nixon argued that: (1) appellate counsel failed to raise on direct appeal any issue regarding Nixon's competency to stand trial; (2) appellate counsel failed to properly preserve Nixon's claims under Ake v. Oklahoma; and (3) appellate counsel failed to properly preserve Nixon's claims under James v. State and Jackson v. State.

[4] Hereinafter referred to as Nixon II.

On appeal, the parties were in disagreement regarding the appropriate standard of review to be applied in this case. The State argued that the standard explained in Strickland v. Washington, 466 U.S. 668 (1984), should be applied, whereas Nixon argued that because counsel's concessions amounted to per se ineffective assistance of counsel, the United States v. Cronic, 466 U.S. 648 (1984), standard was the proper test. Ultimately, this Court held that if Nixon could establish that he did not consent to counsel's strategy, then the Court would find counsel to be per se ineffective under the Cronic standard. This Court reasoned that the Cronic standard should apply because:

> Although statements made by attorneys in closing arguments are not evidence, nevertheless, for all practical purposes, counsel's admission of guilt on behalf of his client denied to petitioner his constitutional right to have his guilt or innocence decided by the jury. Petitioner, in pleading not guilty, was entitled to have the issue of his guilt or innocence presented to the jury as an adversarial issue. Counsel's complete concession of petitioner's guilt nullified the adversarial quality of this fundamental issue.

Nixon, 758 So.2d at 623 (quoting Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir. 1981)). Since counsel's comments operated as the "fundamental equivalent of a guilty plea," this Court concluded that "Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon's of counsel's strategy. Silent acquiescence is not enough." Id. at 624. To avoid similar problems in the future, this Court said:

> [W]e hold that if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel's strategy. This will ensure that the defendant has in fact intelligently and voluntarily consented to counsel's strategy of conceding guilt.

Id. at 625 (citations omitted). Accordingly, we remanded the case to the trial court to hold an evidentiary hearing on the issue of whether Nixon consented to trial counsel's strategy.[5]

On remand, an evidentiary hearing was held before Judge Janet Ferris on May 11, 2001. Although Nixon was present at the evidentiary hearing, he did not testify; the only witness presented was Michael Corin, Nixon's trial counsel. After the hearing, the trial court denied relief and found that Nixon consented to counsel's strategy. This appeal followed.[6]

LAW AND ANALYSIS

The dispositive issue is whether Nixon is entitled to a new trial under this Court's decision in Nixon II. In reaching the merits of his issue, this Court must decide whether there is competent, substantial evidence to support the trial court's conclusion that Nixon consented to trial counsel's strategy of conceding guilt.[7] In Nixon II, this Court directed the trial court

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[5] This Court declined to address the remaining issues in Nixon's 3.850 appeal. Additionally, this Court opted not to address Nixon's habeas claims given its disposition of his 3.850 appeal.

[6] This appeal includes not only the Strickland/Cronic issue but also the seven issues not addressed in Nixon II. Because we grant relief on the ineffective assistance of counsel claim, we do not address the other issues or the claims raised in the habeas petition.

[7] Generally, our standard of review following a denial of a 3.850 claim after holding an evidentiary hearing affords deference to the trial court's factual findings. "As long as the trial court's findings are supported by competent substantial evidence, this Court will not 'substitute its judgment for that of the

to conduct an evidentiary hearing to determine whether evidence existed which indicated an "affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough." 758 So.2d at 624. Nixon never testified at the evidentiary hearing on this issue. On direct examination, trial counsel repeatedly testified that Nixon did nothing when asked his opinion regarding this trial strategy:

> Q: [Nixon's Postconviction Counsel] Did you discuss the strategy of not contesting guilt with the defendant?
>
> A: [Corin] I thought I answered it. But if I didn't answer it, then yes, he was advised as to that, yes.
>
> Q: And how did he respond?
>
> A: To the best of my knowledge, again he did nothing, except after it occurred that he was not real pleased. And I think I answered that before also.
>
> Q: Now what do you mean by he did nothing?
>
> A: He did nothing. I don't know. I don't know what else I can say, Mr. Evans, I have said it before.

Corin further testified that Nixon provided neither verbal nor nonverbal indication that he did or did not wish to pursue

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trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'" McLin v. State, 827 So.2d 948, 954 n.4 (Fla. 2002) (quoting Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997)).

counsel's strategy of conceding guilt.[8] Thus, at most, this testimony demonstrates silent acquiescence by Nixon to counsel's strategy.

The trial court indicated that it would consider the totality of the circumstances in making a determination of whether Nixon affirmatively and explicitly agreed to counsel's strategy of conceding guilt to the charged crime. The court in its written order noted that one of the factors that needed to be examined was the general pattern of Corin's interactions and communications with Nixon. After reviewing the trial record, Nixon I and Nixon II, the transcript of the evidentiary hearing conducted on December 19, 1988, and Corin's testimony at the May 11, 2001, evidentiary hearing, the trial court found that Nixon's pattern of interactions with counsel involved information being provided by Corin, followed by silence from Nixon. In essence, the trial court found that Nixon's failure to approve or disapprove verbally was approval of counsel's strategy.

In Nixon II, we found that counsel's comments at trial were the functional equivalent of a guilty plea. Since counsel's comments operated as a guilty plea, in order to affirm the trial court's ruling, the record must contain substantial evidence which would enable this Court to determine that Nixon did more than silently submit to counsel's strategy. The only evidence presented at the evidentiary hearing was Corin's testimony, which indicated that Nixon neither agreed nor disagreed with counsel's trial strategy. Thus, there is no competent, substantial evidence which establishes that Nixon affirmatively and explicitly agreed to counsel's strategy. Without a client's

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[8] Corin's testimony essentially mirrored his testimony given at the December 19, 1988, evidentiary hearing, at which Nixon invoked the attorney-client privilege. Thus, both the direct and cross-examination of Corin were extremely limited. Nonetheless, at that hearing Corin testified that Nixon did not affirmatively agree to his concession of guilt. Corin also testified that Nixon did not do or say anything to demonstrate his approval of the trial strategy.

affirmative and explicit consent to a strategy of admitting guilt to the crime charged or a lesser included offense, counsel's duty is to "hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt." Nixon II, 758 So.2d at 625 (emphasis added). Since we held in Nixon II that silent acquiescence to counsel's strategy is not sufficient, we find that Nixon must be given a new trial.

CONCLUSION

Accordingly, for the reasons stated in this opinion in Nixon II, we reverse the trial court's denial of postconviction relief and remand for a new trial. In light of our disposition of Nixon's rule 3.850 appeal, Nixon's habeas corpus petition is dismissed as moot.

It is so ordered.

ANSTEAD, C.J., and PARIENTE, QUINCE, and CANTERO, JJ., concur.
ANSTEAD, C.J., concurs specially with an opinion, in which PARIENTE and QUINCE, JJ., concur.
LEWIS, J., concurs in result only with an opinion.
WELLS, J., dissents with an opinion, in which SHAW, Senior Justice, concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

ANSTEAD, J., specially concurring.

I concur in the majority opinion because it simply reaffirms a fundamental principle long ago established by the United States Supreme Court and consistently adhered to by courts, that counsel cannot enter a plea of guilty to a criminal

indictment without the express consent of the defendant. See Jones v. Barnes, 463 U.S. 745, 751 (1983) ("[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, [such] as . . . whether to plead guilty . . . ."); Boykin v. Alabama, 395 U.S. 238, 242-44 (1969) (recognizing that a defendant's decision to plead guilty involves the simultaneous waiver of several constitutional rights and, hence, waiver must be knowingly and voluntarily made by defendant); Brookhart v. Janis, 384 U.S. 1, 7-8 (1966) (holding that attorney does not have the power to enter a plea of guilty or to admit guilt "in effect" where the defendant has not consented to such a strategy); Sistrunk v. Vaughn, 96 F.3d 666, 670 (3rd Cir. 1996) ("[C]ertain litigation decisions are considered 'fundamental' and are for the client to make. These include decisions on whether to plead guilty, whether to testify, and whether to take an appeal."); Johnson v. Duckworth, 793 F.2d 898, 900 (7th Cir. 1986) ("[T]he decision to plead guilty is one that must be made by the defendant, and is not one in which an attorney may speak for his client without consultation."); Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir 1981) ("Unquestionably, the constitutional right of a criminal defendant to plead 'not guilty,' or perhaps more accurately not to plead guilty, entails the obligation of his attorney to structure the trial of the case around his client's plea."); Childers v. State, 782 So.2d 513, 517 (Fla. 1st DCA 2001) ("It is well established that an attorney may not concede guilt for any crimes to which the defendant had pled 'not guilty' unless the court finds that the defendant understands the consequences of the concession, because it is the functional equivalent of a guilty plea."); Taylor v. State, 695 So.2d 1293, 1295 (Fla 5th DCA 1997) ("While counsel may believe it tactically wise to stipulate to a particular element of a charge or to issues of proof, an attorney may not stipulate to facts which amount to the 'functional equivalent' of a guilty plea without [the defendant's] consent.").

This fundamental principle is so firmly established that we have long ago incorporated it into an explicit and mandatory

rule of criminal procedure. See Fla.R.Crim.P. 3.171(c)(1) ("Defense counsel shall not conclude any plea agreement on behalf of a defendant-client without the client's full and complete consent thereto, being certain that any decision to plead guilty or nolo contendere is made by the defendant."); see also Fed.R.Crim.P. 11 (requiring court to conduct inquiry of defendant wishing to plead guilty on the record to ensure defendant knows consequences of such plea); ABA Standards for Crim. Justice, Std. 4-5.2 (3d ed. 1993) (stating that what pleas to enter and whether to accept a plea are ultimately decisions to be made by the accused after receiving full and careful advice from counsel).

Of course, this fundamental principle applies equally to the most heinous offenses as well as those of a less serious nature. Further, while the delay in the resolution of this case should be cause for concern, it is apparent that a significant portion of that delay has been caused by either the failure to apply this principle at the trial level, or out of concern that the State be given every opportunity to demonstrate that the defendant did agree to allow his counsel to admit his guilt to capital murder. We have explicitly denied the defendant any privilege to prevent his counsel from testifying about the defendant's consent to counsel's admission of guilt to capital murder.

When we previously reviewed this case, Justice Harding wrote an opinion that continues to provide a compelling explanation for our adherence to this fundamental principle:

> Prior to this nation's birth, the colonists were subjected to a system of government that denied individual rights and liberties and failed to provide due process. Based on their experience with the English monarchy and its courts, the founders of this country were determined to ensure that a number of individual rights and

liberties were specifically provided for within the body of the Constitution. Today these rights include the right to have effective assistance of counsel in criminal matters, the right against self-incrimination, the right to an impartial jury, the right to a fair trial, the right to confront one's accusers, the right to be presumed innocence until proven guilty, and the right that the government prove a criminal matter beyond a reasonable doubt. These rights are available to all citizens, regardless of race, creed, or social status. History has shown that it is only when due process is strictly adhered to that judicial outcomes are credible. It has been said a number of times that it is more important that no innocent man be convicted than a guilty man go free. See In re Winship, 397 U.S. 358, 372, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, Jr., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."); Furman v. Georgia, 408 U.S. 238, 367 n. 158, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Marshall, J., concurring) ("[I]t is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned.") (quoting William O. Douglas, Foreward to Jerome Frank & Barbara Frank, Not Guilty 11-12 (1957)).

I share and understand the frustration of my colleagues in dissent. This is a difficult case for several reasons, not the least of which is the substantial evidence of the defendant's guilt. I do not question the competence or experience of trial counsel. Neither do I underestimate the frustration counsel may have experienced with such a disruptive and uncooperative client. Nor do I question that the strategy taken by defense

counsel was an effective one reasonably calculated to help the defendant avoid the death penalty. Yet, I cannot accept that substantial evidence of guilt, a disruptive client, and an effective trial strategy can preempt the constitutional right of a defendant to the presumption of innocence and the requirement that a guilty plea be knowingly and intelligently entered. A plea of guilty cannot be entered to a judge or a jury without the defendant's consent. It is not a theoretical gloss or a hypothetical exercise to require that a defendant, no matter how gruesome or horrible his crime, how guilty he is, or how good the trial strategy, be accorded those rights. The courts have consistently required a judge to make inquiry and determine that a guilty plea is voluntarily, intelligently, and freely entered. We have developed a detailed rule setting forth specific procedures that courts must follow in making this determination. See Fla.R.Crim.P. 3.172. My research has not revealed a case where the failure to ensure that a defendant's plea of guilty was voluntary and intelligently entered was error subject to a harmless error analysis.

In the absence of certain knowledge of whether Nixon consented to counsel's strategy, the process for determining guilt or innocence was utterly flawed in this case. If Nixon did not consent, then a number of his constitutional rights were violated: he did not have a fair trial, he did not have effective representation, he was not seen as innocent until proven guilty, and the government was not held to its burden of establishing its case beyond a reasonable doubt. Despite his difficult behavior, Nixon was still

> entitled to his constitutional rights. Without the benefit of these rights, we can place no credence in the jury's verdict of guilt in this case. Any other conclusion would rend the very fabric from which our justice system was woven.

Nixon v. Singletary, 758 So.2d 618, 625-26 (Fla. 2000) (Harding, C.J., concurring).

PARIENTE and QUINCE, JJ., concur.

LEWIS, J., concurring in result only.

In concur in result only because I am compelled to do so solely and exclusively by the doctrine of law of the case. Although the decision and result here are, in my view, both legally and logically incorrect, the "roadmap to reversal" was previously drawn, and the misdirection of the correct applicable legal concepts written in Nixon v. Singletary, 758 So.2d 618 (Fla. 2000), which has become commonly referred to as Nixon II with which I dissented at the time. As unfortunate and convoluted at these legal and factual circumstances may be, I am bound by the prior decision of this Court and will honor its precedent.

In concurring in result only, I do not suggest that this Court has applied the appropriate standards or delivered the correct principles of law in connection with cases involving defendants who have intentionally disrupted the legal process and legal proceedings for their own advantage as has occurred here. I believe the record clearly demonstrates that the defendant here intentionally disrupted his original trial proceedings, effectively blocked a proper and full truth-finding determination of the effective assistance of counsel issue when initially presented to this Court, and has now secured judicial benefits flowing from his disruptive tactics related to the legal

proceedings conducted following the death of the victim in 1984. Almost twenty years after the event, this Court is rewarding an intentionally disruptive defendant and misdirecting a fair and just determination of the issues that should be properly before the court.

I suggest that this Court became misdirected when it held that the present case involved ineffective assistance of counsel per se under the decision of the United States Supreme Court in United States v. Cronic, 466 U.S. 648 (1984), when this Court considered the issue in Nixon II. In my view, this Court had previously considered and rejected such position ten years earlier in 1990 in Nixon v. State, 572 So.2d 1336 (Fla. 1990), when this Court unanimously affirmed Nixon's convictions and sentences. As I read the record in this Court, Nixon asserted on appeal to this Court prior to 1990 that per se ineffective assistance of counsel under Cronic had occurred during the trial proceedings. At that time, this Court remanded the case to the trial court simply for an evidentiary hearing to determine whether Nixon had been informed of the strategy to concede the factual predicate for the case and to center the case upon seeking leniency and preserving the life of the defendant. When the case was remanded at that time, the trial court found and determined:

> 1. Trial Defense Counsel Corin reviewed with capital Defendant/Appellant Nixon, the defense approach to the case in general terms including, but not limited to, the probability that he would concede the killing of the victim by Nixon.
>
> 2. Corin and Nixon had previous attorney-client relationships, both were veterans of the criminal justice system and although Nixon manifested no reaction, he understood what was to take place.

> 3. Nixon made no objection and did not protest the strategy and tactic employed at trial.
>
> Based on the foregoing, this Court concludes that the Defendant/Appellant Nixon has not sustained his burden of proof by the applicable standard that he (a) was neither informed nor knew of the trial strategy and tactic employed by Defense Trial Counsel Corin nor (b) did not consent thereto or (c) acquiesce therein.

State v. Nixon, No. 84-2324-CF, order at 10 (Fla. 2d Cir. Ct. order filed Oct. 3, 1989).

The foregoing findings by the trial judge were entered as the case had been remanded to the trial court for specific findings on the issue. The trial court's order and findings were abundantly clear that Nixon never sustained his burden in connection with the claims of ineffective assistance of counsel based upon allegations that he was neither informed, nor knew of the trial strategy, nor did Nixon carry his burden to demonstrate that he had not consented to the trial strategy employed by this defense counsel. The findings entered before our 1990 opinion are important in consideration of the flow of the present case because in our earlier 1990 opinion, we specifically stated:

> However, the state's examination of Mr. Corin [defense counsel] was extremely limited due to this refusal to testify concerning matters not already addressed during his testimony for the defense absent Nixon's waiver of the attorney-client privilege. Nixon refused to waive the privilege and the State was unable to fully examine Mr. Corin.
>
> We recognize the confusion resulting from our remand for these atypical proceedings and

> decline to dispose of this claim on the present state of the record which we view as less than complete. Accordingly, we do so without prejudice to raise the issue in a later motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850.

Nixon v. State, 572 So.2d at 1340 . It is clear that this Court was concerned at that time that it was not permitted to have access to the full information because Nixon had refused to waive the attorney-client privilege. The Court at that time noted that the record was incomplete due to Nixon's failure to waive the attorney-client privilege.

In my view, this Court in 1990 considered and rejected application of United States v. Cronic and rejected the view that under these circumstances per se ineffective assistance of counsel arose. If Cronic were applicable when presented to this Court in 1990, it would have been unnecessary to conduct further proceedings regarding the interaction between Nixon and his counsel. I suggest that the Court in 1990 understood the record before it and concluded that the record did not establish per se ineffective assistance of counsel as the applicable standard. There would have been no need for further activity had that been the conclusion of this Court at that time. In my view, this Court only permitted Nixon an opportunity to present the issue again in a collateral motion to afford an opportunity to Nixon to establish by additional evidence the elements required by Strickland. When the postconviction collateral motion was filed by Nixon and considered initially, Nixon chose not to present sufficient evidence to afford relief under Strickland, and, in fact, precluded full examination of the issue with regard to counsel's performance by refusing to permit his counsel to testify concerning their conversations. In essence, in the collateral proceeding, this Court in Nixon v. Singletary, 758 So.2d 618 (Fla. 2000), permitted Nixon to assert the issue of ineffective assistance of counsel and then assert an attorney-client privilege

by remanding for consideration of the issue under the standard established in Cronic rather than applying the requirements of Strickland.

My view of the record indicates that Nixon confessed to law enforcement and to members of his family with regard to the facts surrounding the murder of the victim in this case. The evidence indicated that Nixon was competent to participate in the trial proceeding, that he was malingering, and that he was attempting to disrupt the orderly process of the trial court proceedings. Under these circumstances, the majority of this Court in Nixon II, in my view, precluded trial counsel from attempting to save the life of a defendant through a trial strategy that would accept the existence of the overwhelming factual evidence and attempt to center upon preserving the life of the defendant. This Court announced the requirement in Nixon II that before this type of trial strategy or trial tactic may be utilized, the attorney must either first obtain express approval of the trial court after presenting all of the negative factual information to a trial judge who is the final adjudicator as to whether a death penalty will be imposed or obtain the express acceptance of a particular trial strategy by a disruptive defendant who has no intention of ever cooperating so that a trial proceeding could move forward. In my view, this Court reached an impractical result in Nixon II, and such result and the standards expressed therein rendered the proceedings which we now review as perfunctory steps in the process.

My review of this record demonstrates an especially aggravated circumstance where the victim had been kidnapped in her own motor vehicle from a local shopping mall, the victim had been tied between trees with motor vehicle jumper cables and the victim was actually burned alive. Here, Nixon confessed not only to law enforcement in substantial detail, but he also confessed to members of his immediate family who testified about those very confessions during the trial. Three well-respected trial judges have now examined the issue of trial

counsel's effectiveness and the trial strategy utilized, and have made it clear that this defense attorney was approaching this case in the only available and reasonable defense posture possible in attempting to save Mr. Nixon from the death penalty under the facts presented in this case.

In the initial postconviction collateral proceeding, the trial judge entered an exhaustive order detailing the conduct of this capable defense counsel and the very significant actions, including the introduction of some fifty exhibits in support of mitigation and the presentation of at least nine witnesses to provide mitigation evidence directed to the defendant's background, and mental and emotional problems. The trial judges have continuously emphasized the strategic theme and trial tactic that focused upon Nixon's mental and emotional problems and that defense counsel was simply presenting the very best argument and approach to secure a life sentence with the admitted aggravated factors that were presented before the jury.

When the case was before this Court in 2000, the trial judge during the initial postconviction proceeding had expressly addressed and rejected the argument that these circumstances must be controlled by United States v. Cronic, and the trial judge at that time expressly stated:

> (3) In the alternative, Defendant argues that counsel's concession of guilt without an express waiver by Defendant on the record constitutes ineffective assistance of counsel per se under United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Defendant claims that Cronic obviates the necessity of demonstrating prejudice, which is normally required for an ineffective assistance of counsel claim.

In Cronic, the United States Supreme Court held that when surrounding circumstances justify a presumption of ineffectiveness, a Sixth Amendment claim can be sufficient without inquiring into counsel's performance. Such circumstances arise when a Defendant is denied presence of counsel at a critical stage in the prosecution or when there is a breakdown in the adversarial process that would justify a presumption that a Defendant's conviction was reliable. Id. at 2046-2049. Cronic applies to a narrow spectrum of cases where counsel's ineffectiveness was so egregious that the Defendant was in effect denied any meaningful assistance at all. See also, Chadwick v. Green, 740 F.2d 897 (11th Cir. 1984). Apart from circumstances of that magnitude, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermine the reliability of the finding of guilt. Cronic, supra, at 2047 (citing Strickland v. Washington, 466 U.S. at 693-606, 104 S.Ct. At 2067-2069).

As evidenced by the court record cited in the above paragraphs, this case is not one in which the surrounding circumstances justify a presumption of ineffectiveness. There is no allegation that Defendant was denied assistance of counsel in his defense. Cronic, supra, at 2044. Neither the deficiency alleged, nor the record of the trial reveal a breakdown in the adversarial process that would justify a presumption that Defendant's conviction was not sufficiently reliable to satisfy the Constitution. Cronic, supra, at 2049. Because defense counsel's concession of guilt, to try to retain sympathy during the

penalty phase, is an acceptable strategy, Defendant is required to show prejudice. This reasoning is consistent with other courts that have applied the Strickland standard for ineffective assistance of counsel claims, which requires prejudice to similar defense strategies. See Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987). Defense counsel's concession of guilt did not, and could not possibly have prejudiced Defendant in any way. The evidence of guilt was so overwhelming the jury would have found him guilty as charged even without concession. For the same reasons discussed under the Strickland claims, Defendant fails to show that but for counsel's errors the result of the proceeding would have been different.

When this Court in 2000 rejected this reasoning, it failed to accommodate the severe and aggravated factors with which the trial court was faced. The defendant here would not attend trial court proceedings, the defendant had removed his clothing in a holding cell, and the defendant had demanded that a different judge conduct the proceedings and that he be assigned different counsel. I suggest that the record in these proceedings prior to this Court's decision in 2000 reflects that Nixon had continually attempted to disrupt the proceedings in this case. When this Court rendered its decision in 2000 in Nixon II, it demonstrated that Nixon had succeeded in his attempt and that decision was predicated upon all facts which were available to be considered.

In my view, experienced defense counsel, who was doing the very best under the most difficult of circumstances, attempted to save the life of this defendant. The circumstances in this case involved very heinous and aggravated circumstances and the violent and aggravated circumstances were admitted by the defendant to not only law enforcement personnel but also to

members of his family who all testified in detail concerning those confessions. Here, the circumstances, trial strategy, and trial tactics of experienced defense counsel have now been recognized by multiple trial judges as the clearly appropriate and essentially the only defense strategy available under these aggravated facts. This record demonstrates that experienced defense counsel was conscientious and worked diligently in the best interests of his client as he attempted to preserve his life. In my opinion, it is clear that everyone, including Nixon, was aware of the trial strategy but the burden placed upon the proceedings by this Court in Nixon II rendered the present outcome the only possible outcome under the law and standards as stated.

I am extremely concerned that the history in this case may be improperly utilized by individuals in the future and that due to the nature of the restrictions this Court has now placed upon defense counsel, the defense of death penalty defendants will not be performed in the most effective manner possible. I suggest that cases such as this place trial lawyers in the most difficult of situations. When an individual confesses not only to law enforcement but also to members of his or her immediate family with regard to very aggravated and heinous crimes and this Court will not permit a trial attorney to even acknowledge that which has been confessed as true but forces the attorney to engage in full litigation as though the confessions never occurred, lawyers and the judicial system are placed in a precarious position and citizens are legitimately caused to question the veracity of lawyers and judicial proceedings. If I were writing on a clean slate, I would affirm the decision of the trial court here but, unfortunately, Nixon II directs a different result and I am therefore compelled to concur in the result based solely upon the law of the case.

WELLS, J., dissenting.

I dissent because I conclude that this Court's granting to defendant Nixon a new trial is legally wrong and not justified or demonstrated to be required by the majority opinion.

It has now been almost nineteen years since Ms. Bickner was abducted from the Governor's Square Mall in Tallahassee and murdered. This same issue upon which a new trial is now granted by the majority has been framed in this record since Judge Hall made his statement at the close of the trial proceedings in 1985. Clearly, this same issue was in the record when this Court affirmed Nixon's conviction and sentence of death in 1990.

Then, in 2000, if this Court was going to grant a new trial on this issue, the question was expressly before this Court. I wrote at that time:

> I also dissent because I believe the majority's opinion, after more than nine years, creates a new standard for this case. The majority opinion states at page 624 (slip opinion): "[W]e conclude that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough." Is this to be "established" by a preponderance of the evidence - clear and convincing evidence - or to the exclusion of every reasonable doubt? Is a nod of the head sufficient, or does the majority actually require a [Boykin v. Alabama, 395 U.S. 238 (1969)] on-the-record acceptance to have been made? It appears to me that the majority is here dictating a new trial, only leaving to the trial judge the actual ordering of it.

This appears to me to dictate a new trial because the record has been clear for the fifteen years since this trial that during the trial Nixon set about not to "explicitly accept" anything. This was part and parcel of his disruptive and noncooperative conduct. If "explicit acceptance" per Boykin is the requirement, this Court should have so stated in 1990. If that had been correctly the issue then, this Court's majority at that time would have reversed for a new trial based on the record, which does not have a Boykin on-the-record "explicit acceptance." However, the then unanimous majority did not do that. The present new majority confuses our procedure when it in actuality rehears and sets aside that decision. I conclude that it is harmful to the processing of capital cases generally when the majority of this Court erodes the distinction between direct appeal and postconviction relief for a particular case, as is being done here.

Nixon v. Singletary, 758 So.2d 618, 634 (Fla. 2000) (Wells, J., dissenting). But this Court did not order a new trial but remanded this case for an evidentiary hearing in the circuit court.

Upon that remand, Judge Janet Ferris held the hearing ordered by this Court's majority. Judge Ferris thereafter, in an exceptionally thorough and thoughtful order, came to the conclusion that the postconviction motion should be denied. In pertinent part, Judge Ferris' order states:

> Issues now before this court for resolution involve legal challenges initially raised in Defendant Joe Elton Nixon's direct appeal from his conviction and sentence of death for the murder of Jeanne Bickner. Ms. Bickner was murdered on August 12, 1984. Joe Elton Nixon's

trial for that murder took place in July of 1985, and his conviction was appealed to the Florida Supreme Court. In the direct appeal, the Court was asked to address Mr. Nixon's claim that he was denied effective assistance of counsel at the guilt phase of his trial when his attorney, Assistant Public Defender Michael Corin, conceded guilt and sought leniency regarding Mr. Nixon's punishment. To fully explore that issue, the Florida Supreme Court temporarily relinquished jurisdiction to the trial court in October of 1987 to "determine whether Nixon was informed of the strategy to concede guilt and seek leniency." Nixon v. State, 572 So.2d 1336, 1339 (Fla. 1990).

Due to some confusion about the procedure to be followed at the evidentiary hearing, a second order was issued by the Supreme Court on October 4, 1988, to outline which witnesses would be permitted to testify and limitations on their cross-examination. Continuing confusion about the scope of the hearing and the trial court's responsibilities at that hearing resulted in another clarifying order on February 1, 1989. At the August 30, 1989, hearing that finally attempted to resolve the ineffective assistance issue, Mr. Nixon declined to waive the attorney-client privilege, which effectively precluded Mr. Corin from discussing his communications with Mr. Nixon. The Supreme Court found the record of those proceedings "less than complete," and ultimately declined to dispose of the claim, inviting the defendant to revisit the matter in a post-conviction motion brought pursuant to Florida Rule of Criminal Procedure 3.850. Nixon, at 1339-1340.

Mr. Nixon filed his 3.850 motion on October 7, 1993. In 1997, the trial court denied the motion without an evidentiary hearing. Included in that order was the summary denial of several claims asserting that Mr. Nixon's trial counsel was ineffective, including the specific claim that Mr. Corin's concession of guilt without an express waiver by Defendant on the record constituted per se ineffective assistance of counsel under United States v. Cronic, 466 U.S. 648 (1984). The trial court disposed of Mr. Nixon's Cronic claim by finding that ". . . his case is not one in which the surrounding circumstances justify a presumption of ineffectiveness. . . . Neither the deficiency alleged, nor the record of the trial reveal a breakdown in the adversarial process that would justify a presumption that Defendant's conviction was not sufficiently reliable to satisfy the Constitution (citation omitted)." That order was appealed to the Florida Supreme Court, resulting in Nixon v. Singletary, 758 So.2d 618 (Fla. 2000), the decision which has again remanded Mr. Nixon's case to the trial court for a limited evidentiary hearing.

In Nixon v. Singletary, the Supreme Court considered both the trial court's summary denial of Mr. Nixon's 3.850 post-conviction motion and his petition for writ of habeas corpus. In deciding to remand the case to the circuit court for an evidentiary hearing, the Court concluded that the ". . . resolution of one issue . . . [is] dispositive in this case: whether Nixon's trial counsel was ineffective during the guilt phase of the trial." Nixon v. Singletary at 620. Although numerous ineffectiveness claims were raised in Mr. Nixon's 3.850 motion, the Court's decision focused on

Nixon's charge that his attorney's concession of guilt in opening statement was ". . . the equivalent of a guilty plea by his attorney." Nixon v. Singletary at 620. Mr. Nixon's further claim that he did not give his attorney consent to enter a guilty plea and did not consent to a trial strategy in which guilt would be admitted was a compelling issue for the Court. In a lengthy opinion, the Court concluded that Mr. Corin's statements to the jury were the "functional equivalent of a guilty plea." Nixon v. Singletary at 624.

Reasoning further that due process requires ". . . a court accepting a guilty plea to carefully inquire into a defendant's understanding of the plea so that the record contains an affirmative showing that the plea was intelligent and voluntary . . . ," the Court indicated that Mr. Nixon's "consent to this trial counsel to concede guilt" would apparently substitute for the lack of an inquiry and finding by the trial court that the "plea" was intelligent and voluntary. As further direction to this court regarding the evidentiary hearing, the Supreme Court observed that ". . . Nixon's claim must prevail at the evidentiary hearing below if the testimony established that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy. Silent acquiescence is not enough." Nixon v. Singletary at 624. The Supreme Court found that the need for affirmative, explicit acceptance of this trial strategy emanates from the principle that ". . . the defendant, not the attorney, is the captain of the ship. . . . Although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant. The

question is not whether the route taken was correct; rather the question is whether Nixon approved of the course." Nixon v. Singletary at 625.

The Supreme Court's remand appears limited to one issue: did Joe Elton Nixon give his attorney, Mike Corin, consent to concede guilt at trial, and was that consent supported or evidenced by an "affirmative, explicit acceptance by Nixon" of this specific aspect of the trial strategy? One might suspect that such a question could be answered quickly and easily following a brief hearing. Unfortunately, that is not the case. Not only has there been disagreement about the status of Mr. Nixon's other post-conviction claims, but there is continuing dispute about the appropriate legal standard to be employed in resolving claims such as this. The State has forcefully argued that the Florida Supreme Court's understanding of United States v. Cronic, supra, is flawed, and that recent federal court decisions interpreting Cronic have explicitly rejected the Supreme Court's analysis of the issue. The State argues here, as it has recently in the United States Supreme Court, that the Florida Supreme Court's interpretation of Cronic is "overly expansive" and is contrary to the holding of the seminal post-conviction case of Strickland v. Washington, supra. Although compelling arguments, this court cannot agree that it is a liberty to revisit the legal basis for the remand in Nixon v. Singletary, supra. Other opportunities exist for the State to present its argument for resolution by the Florida Supreme Court and the United States Supreme Court.

It is obvious, however, that the Florida Supreme Court's opinion presents this court with a dilemma. Ordinarily, those matters deemed inappropriate for summary resolution of 3.850 post-conviction claims are returned to the trial court intact for an evidentiary hearing, and the resolution of the motion is based on application of the law to the facts determined at the hearing. In Nixon v. Singletary, the Supreme Court not only resolved the legal issues, but also circumscribed the type of evidence and the manner in which it could be considered by the trial court in addressing Mr. Nixon's claim. The most obvious concern faced by this court is how to balance the Supreme Court's direction to not only determine whether Mr. Nixon gave his consent to Mr. Corin's strategy of concession of guilt, but to do so only in the context of an "affirmative, explicit acceptance by Nixon" of that strategy. Ordinarily, the trial court may consider many factors in resolving issues of knowing and voluntary waivers of rights, and this case should be no exception. The court must also note that the burden of advancing his claim rests with Mr. Nixon, not the State, but the language of Nixon v. Singletary, suggests a shifting of that burden. The court can only conclude that such a shift was not intended, and that the burden of proof still rests with Mr. Nixon to show that he did not consent to the strategy affirmatively and explicitly.

At the evidentiary hearing held on May 11, 2001, Mr. Nixon did not testify, although he was present in the courtroom. Instead, counsel for Mr. Nixon called Mr. Corin to the witness stand, presumably to show that Mr. Nixon did not

consent. Mr. Corin was candid and forthright in his testimony, and struggled to recall the details of an attorney-client relationship that was forged seventeen years ago. The details of that relationship are complicated by Mr. Nixon himself, a rather intractable client charged with an especially horrible and notorious crime. The record of the guilt and penalty phases of his trial demonstrate that Mr. Nixon had mental health problems dating back to a very young age. Mental health professionals who examined Mr. Nixon prior to trial specifically noted that although Mr. Nixon was competent to stand trial and "technically" capable of cooperating with his attorney, ". . . his lifelong history of lying and creating fantasy situations and blaming others for his troubles . . . [will make it] extremely difficult to get his full cooperation. . ."

That difficulty was evident a trial when Mr. Nixon removed his clothing in the holding cell during jury selection in an express demonstration of his refusal to attend the trial; he had previously refused to attend pretrial motions on July 8 and 9, 1985, forcing Mr. Corin to waive his presence at those hearings. Nixon v. State, at 1341. Without much elaboration, he insisted on being returned to the jail, wanted a new attorney, demanded a black judge, and threatened to disrupt the trial if he was forced into the courtroom. Nixon v. State, at 1341. During his conversation with Judge Hall in the holding cell, Mr. Nixon rarely answered the question posed to him, and at one point flatly refused to answer any more questions. The colloquy between Mr. Nixon and Judge Hall shows that Mr. Nixon was generally unresponsive to Judge Hall's patient inquiries, and consciously

evaded answering the judge's questions regarding his refusal to enter the courtroom. The Supreme Court accepted Judge Hall's finding that Mr. Nixon's extraordinary behavior constituted a knowing, intelligent, and voluntary waiver of his attendance at the trial. That waiver, however, was based on the judge's finding that if Mr. Nixon failed to return to the courtroom after the recess, he would be consenting to proceeding without him. Id.

This court concurs in Judge Hall's conclusion that Mr. Nixon knowingly, intelligently, and voluntarily waived his attendance at the trial. However, it must be noted that the record does not reflect what would ordinarily be considered an affirmative, explicit waiver by Mr. Nixon of his right to be present at trial; instead, Judge Hall made his decision based on the circumstances as they existed at the time, Mr. Nixon's unusual behavior, and his exasperating conversation with Mr. Nixon. It is therefore obvious that the decision regarding whether Mr. Nixon consented to Mr. Corin's trial strategy can be made only after careful consideration of similar factors.

One of those factors must be the general patterns of Mr. Corin's interactions and communications with Mr. Nixon. By 1984, when he undertook representation of Mr. Nixon in this case, Mr. Corin was an experienced trial attorney, and had also handled capital criminal appeals as an Assistant Attorney General and an Assistant Public Defender. Mr. Corin's experienced with capital cases included attending and lecturing at a course designed exclusively for attorneys involved in capital cases. It is also of some note

that Mr. Corin had represented Mr. Nixon in at least one other felony case prior to him being charged with first degree murder. The record clearly reflects that Mr. Corin conscientiously prepared the case for trial, and met numerous times with Mr. Nixon to discuss various trial strategies, the defenses that might apply in the case, and witnesses.

Mr. Corin indicated that his relationship with Mr. Nixon was generally positive, and that they got along "fine." Despite an apparent lack of rancor or hostility in their attorney-client relationship, Mr. Corin noted that Mr. Nixon was not especially communicative, and often did not respond at all in discussions about the case. Testimony from Mr. Corin about Mr. Nixon's reaction to discussions about trial strategy, and in particular about conceding guilt, was especially compelling; Mr. Corin observed that although he discussed these matters with Mr. Nixon on several occasions, Mr. Nixon "did nothing." More importantly, Mr. Corin stated unequivocally that he would not have pursued the strategy of conceding guilt if Mr. Nixon had objected. The only conclusion that can be reached from this uncontroverted testimony is that the pattern of interactions in the attorney-client relationship between Mr. Corin and Mr. Nixon often involved information being provided by Mr. Corin, followed by silence from Mr. Nixon. Whether that pattern of interaction was constructive or helpful is not the issue; rather, Mr. Corin appears to have done all he could to carefully prepare the case for trial, consider the viability of various defenses, inform Mr. Nixon of what was happening with his case, and finally,

tell his client what strategies he intended to pursue. It makes little sense to assume that a lawyer would encourage of prefer such stony silence from his or her client; there can be no doubt that active participation by the client in their defense is far more productive. It is also clear that when a client is a highly educated, intelligent, and articulate individual with no mental health problems, the patterns of communication between lawyer and client will be quite different from what usually transpired between Mr. Corin and Mr. Nixon. Mr. Corin did the best he could with a difficult case and a difficult client.

In resolving post-conviction claims, defendants urge trial courts to revisit each and every decision made by an attorney before, during and after a trial. Increasing numbers of motions to withdraw pleas are filed, and post-conviction motions asserting misadvice of counsel leading up to entry of a plea have flooded the trial courts. At their core are various assumptions about a criminal defendant's "right" to perfection in his or her representation. As the State noted in its Memorandum, everyone involved in the court process must possess a ". . . true understanding of the realities of representing criminal defendants." Mr. Corin perhaps stated the obvious when he testified that representing criminal defendants is a "pretty tough job" because some clients are helpful and others are not. He patiently pointed out that as a defense attorney ". . . you hope that you have clients that are cooperative"; when clients are not, "you do the best you can . . . [and] represent them to the best of your ability." In response to a question from Assistant State

Attorney Eddie Evans, Mr. Corin responded as follows: "But you've never been a criminal defense lawyer. So you don't really understand exactly how it is when you represent human beings in cases. And it is just not black and white, but and dry. There are many times lawyers make decisions because they have to make them because the client does nothing." Mr. Corin's response was: "Yes, sir."

Mr. Corin's statements are compelling. The record of Mr. Nixon's trial provides ample evidence of what Mr. Corin faced in his interactions and communications with Mr. Nixon. It is hard to imagine a more onerous situation than a client charged with first degree murder absenting himself from the trial; here, in addition to a confession and overwhelming evidence, Mr. Corin had to contend with the prejudice Mr. Nixon would surely create by not being present in the courtroom during the trial. Did Mr. Nixon discuss with Mr. Corin his decision to take off his clothing and refuse to enter the courtroom? Should there have been an inquiry about whether this was Mr. Nixon's execution of an agreed-upon trial strategy, and whether he consulted with his attorney about it? It is evident Mr. Nixon made his position known through bizarre behavior and angry statements, and not by an affirmative or explicit discussion of his decision with trial counsel or the court. It is likewise impossible to resolve the Supreme Court's question by reliance on an unrealistic construct. Mr. Corin's conduct as an attorney in this case must be evaluated by the objective standards described in the case law articulated by the United States Supreme Court, the Florida

Supreme Court, and our District Courts of Appeal. That objective standard also must be applied to the facts and circumstances of this case, without resort to unfair presumptions about what should have occurred.

Relying on the trial court, the two reported decisions of the Florida Supreme Court addressing Mr. Nixon's case, and the evidentiary hearings conducted on December 19, 1988 and May 11, 2001, this court finds that Mr. Nixon did consent to the trial strategy of conceding guilt. His consent occurred as a part of his natural pattern of communication with Mr. Corin, wherein Mr. Corin would discuss these matters with Mr. Nixon, and Mr. Nixon would refuse to respond. The court further finds that the fact that Mr. Nixon did not provide counsel with an affirmative, explicit consent in words, and in the manner that we ordinarily expect and presume is acceptable, does not mean that it was not given. Looking to Mr. Nixon's manner of communicating with counsel and with the court during his jury trial alone, it is obvious that Mr. Nixon is often more comfortable communicating through his behavior, rather than the spoken word. The lack of words cannot, and did not, render his communication any less clear or explicit. Were we now to craft a legal standard requiring articulation for every knowing and voluntary waiver of rights, where other evidence exists to support the conclusion that a knowing and voluntary waiver occurred, we will create a standard that is impossible to meet. We may also encourage the creation of situations that will be impossible to resolve: if, after jeopardy attaches in a jury trial, the defendant merely refuses to

> answer a judge's questions about his or her presence at the trial, agreement with trial strategies such as conceding guilt on some charges but not others, or testifying at trial, what is the appropriate resolution of such an obvious stalemate? Trial courts must be given the opportunity to resolve such matters based upon the facts, rather than the existence or non-existence of certain words. In the case at bar, Mr. Nixon's actions speak clearly. We cannot now search for words that he was clearly disinclined to provide.

State v. Nixon, No. R84-2324AF, order at 1-14 (Fla. 2d Cir. Ct. order filed Sept. 20, 2001) (record references omitted). Judge Ferris did what this Court's majority ordered. She held an evidentiary hearing and reached a factual conclusion. Now this court rejects Judge Ferris's conclusion and grants a new trial. I agree with Judge Ferris.

SHAW, Senior Justice, concurs.

Three Cases Consolidated:

Two Appeals from the Circuit Court in and for Leon County,

L. Ralph Smith, Jr., Judge - Case No. 84-2324

and An Original Proceeding - Habeas Corpus

Jonathan Lang, New York, New York, Eric M. Freedman, New York, New York, and John J. Lavia, III of Landers & Parsons, Tallahassee, Florida,

for Appellant/Petitioner

Charles J. Crist, Jr., Attorney General, and Curtis M. French, Senior Assistant Attorney General, Tallahassee, Florida,

for Appellee/Respondent.

Supreme Court of Florida

WEDNESDAY, OCTOBER 1, 2003

CASE NOS.: SC01-2486; 92006;
SC93192
Lower Tribunal No.: 84-2324-CF

JOE ELTON NIXON vs. STATE OF FLORIDA
JOE ELTON NIXON vs. JAMES V. CROSBY, JR., ETC.

Appellant/Petitioner Appellee/Respondent

Appellee/Respondent's Motion for Rehearing is hereby denied.

ANSTEAD, C.J., PARIENTE, LEWIS, QUINCE and CANTERO, JJ., concur.
WELLS and SHAW, Senior Justice, dissent.

A True Copy
Test:

_____
Thomas D. Hall
Clerk, Supreme Court

tc
Served:

EDDIE D. EVANS
ARMANDO GARCIA
ERIC M. FREEDMAN
CURTIS M. FRENCH
HON. BOB INZER, CLERK
HON. JANET E. FERRIS, JUDGE